

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



IN THE  
**United States Court of Appeals**  
for the District of Columbia Circuit  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**FILED** MAY 29 1968

Nos. 21,833, 21,834,  
21,835, 21,836

ORIENT MID-EAST LINES, INC.,

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE,  
INC., SEVENTH DAY ADVENTIST WELFARE SERVICE,  
INC., CHURCH WORLD SERVICE, INC., LUTHERAN  
WORLD RELIEF, INC., and UNITED STATES OF AMERICA,  
*Appellees.*

**CONSOLIDATED APPEAL FROM FINAL DECREE ENTERED IN  
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT  
OF COLUMBIA—FEBRUARY 23, 1968**

**JOINT APPENDIX**

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and

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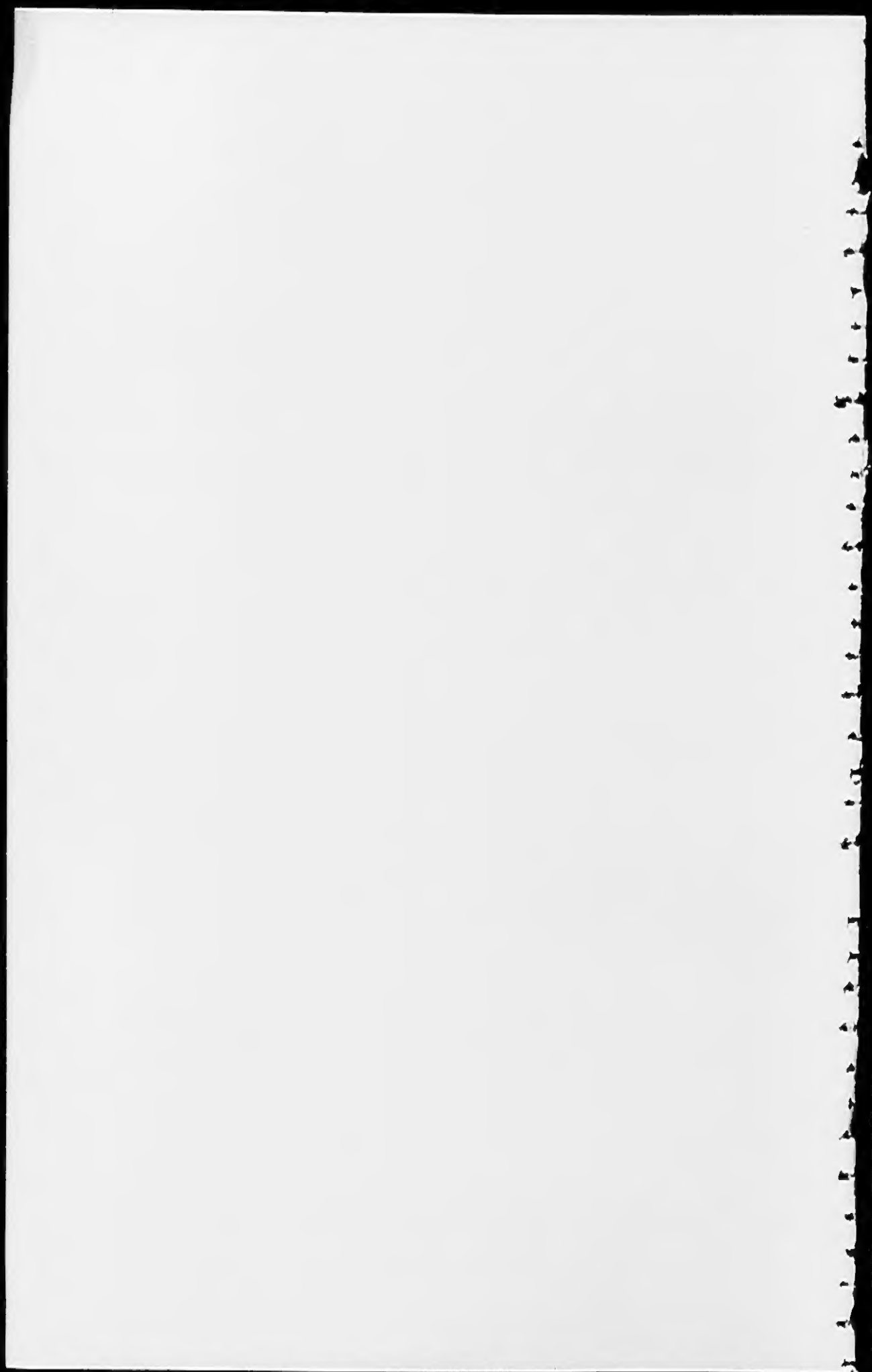
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**United States District Court**

FOR THE DISTRICT OF COLUMBIA

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Number 6-65

---

ORIENT MID-EAST LINES, INC.

*v.*

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.

UNITED STATES

*Intervenor*

---

ACTION

Admiralty

PETITIONER'S ATTY.

Marvin J. Coles

Stanley O. Sher

818—18th St., N.W.

**Docket Entries**

<u>Date</u>	<u>Proceedings</u>
1965	
Mar. 19	Complaint for Libel; Exhibits A thru Q, 1 thru 12 filed
Mar. 22	Let the Citation issue. (Fiat) Matthews, J.
Mar. 22	Citation & copy issued, Ser. 3-23-65
Apr. 15	Appearance of Alexander B. Hawes as attorney for respondent filed



*Docket Entries*

<u>Date</u>	<u>Proceedings</u>
Apr. 21	Answer of respondent to complaint; c/m 4-21-65. filed
Jun. 11	Motion of United States of America for leave to intervene as a respondent; c/m 6-11-65; ex- hibit; P & A; App. David C. Acheson, United States Attorney. M.C. filed
Jun. 23	Notice of Pltff. to take deposition de bene esse of S. Orfanos, Master of the SS Orient Mer- chant; c/m 6/22/65. filed
July 12	Order granting motion of United States to inter- vene as party respondent. (N) Youngdahl, J.
July 13	Answer of United States of America, Respond- ent-Intervenor to complaint. filed
July 13	Motion of intervenor to produce; affidavit; c/m 7/7/65; points and authorities; M.C. 7/13/65. filed
<hr/>	
July 14	Calendared (N) (AC/N) (as of April 21, 1965)
July 14	Stipulation of counsel extending time for libelant to respond to motion to produce for 21 days. filed
Aug. 5	Appearance of Donald D. Webster, as counsel for Pltff.
Aug. 5	Deposition of Anestis Stamatio Orfanos by Pltff. June 29, 1965. filed
Aug. 5	Change of address noted for atty. for Pltff. Stanley O. Sher to 818—18th St., N.W.
Aug. 5	Opposition of Pltff. to motion of intervenor to produce Affidavit & Exhibit "A" and support- ing affidavit c/m 8/5/65. filed

*Docket Entries.*

<u>Date</u>	<u>Proceedings</u>
Sep. 9	Withdrawal of Motion to produce by intervenor. filed
Oct. 26	Called. Asst. Pretrial Examiner
1966	
Mar. 30	Motion of parties to consolidate case for trial. filed
Mar. 31	Order consolidating action with District Court Nos. 7-65, 22-65 and 34-65. Gasch, J.
Apr. 25	Certificate of Readiness by Libelant; c/m 4/25/66. filed
Oct. 3	Pretrial Proceedings', Pltfs. Counsel to file briefs. Pretrial Examiner
Oct. 31	Trial Brief of Pltf.; c/s. filed
Nov. 28	Stipulation extending time to file pretrial briefs & replys & request to amend Pretrial Order. "Allowed" Pretrial Examiner
Dec. 1	Trial Brief of Deft. United States; c/m 11/30/66. filed
Dec. 21	Reply Brief of Pltf.; c/m 12/21/66. filed
1967	
Apr. 5	Amendment No. 1 to stipulation of facts by Counsel for plaintiffs and Intervenor, USA. Approved. Pretrial Examiner
Apr. 17	Amendment No. 2 to stipulation of facts "ap- proved & filed" Pretrial Examiner
Apr. 18	Hearing begun and respited until 10:00 a. m. April 19, 1967. (Reporter Eva Marie Sanche) Corcoran, J.

*Docket Entries*

<u>Date</u>	<u>Proceedings</u>
Apr. 19	Hearing resumed and concluded; Motion of Intervenor U.S.A. to dismiss and case taken under advisement; (briefs to be filed within 10 days after transcript of proceedings filed) Reporter Eva Marie Sanche. Corcoran, J.
May 23	Plaintiff's post trial brief. c/s 5/22/67; Appendix. filed
May 23	Defendant U.S. brief on liability c/s 5/22/67. filed
Aug. 1	Order dismissing complaint insofar as demand for damages re; second freight. (N) Corcoran, J.
Aug. 1	Memorandum opinion re: damages on second freight. (N) Corcoran, J.
Aug. 14	Trial proceedings, Transcripts Volume I (pages 1 thru 94) and Volume II (pages 95 thru 261) Court copies. (Reporter Eva Marie Sanche) filed
Nov. 1	Brief of plttf on Clause 25 of the Bills of Lading; c/m 11/1/67 filed
Nov. 21	Memorandum of deft. United States in opposition to plaintiff's brief; c/s 11/17/67. Appearance David G. Bress, U. S. Attorney, E. Grey Lewis, Assist. U. S. Atty. and Allen Van Emmerik, Dept. of Justice. filed
Dec. 1	Reply of Plaintiff to Defendants' Memorandum on Clause 25 of the Bill of Lading and on allowance of Storage Charges; c/s 11/30/67. filed
1968	
Feb. 15	Letter to Judge Corcoran from Marvin Coles concerning cargo, dated 2/13/68. filed



*Docket Entries*

<u>Date</u>	<u>Proceedings</u>
Feb. 23	Ordered dismissing plaintiffs causes of action for second separate freights for carrying the cargoes here involved and for compensation for overnites storage; plaintiff recovers from defendants the sum of \$13,543.90 together with interest at 4% from March 22, 1965; each party shall bear its own costs. (N) Corcoran, J.
Feb. 23	Supplemental opinion filed (N). Corcoran, J.
Mar. 13	Notice of appeal plaintiff. Copy mailed to Lawrence F. Ledebur, Alexander B. Hawes and Wm. D. Donnelly. Deposit by Sher \$5.00.
Mar. 13	Cost bond on appeal of plaintiffs. in sum of \$250.00 with National Surety Corporation. approved. Bond for all r consolidated cases. Corcoran, J.
Apr. 2	Exhibits to deposition of Anestis Stamatio Orfanos, filed Aug. 5, 1965. filed
Apr. 2	Plaintiff's Exhibits 1, 2 & 3. filed
Apr. 2	Defendant's Exhibits 1(a) 1(b) 1(c) 1(d) 1(e) 1(f) 1(g). filed
Apr. 19	Stipulation transmitting five documents to USCA as a supplemental record; "So ordered". Corcoran, J.
Apr. 19	Record on Appeal delivered to USCA; Deposit by Stanley O. Sher, \$1.40.
Apr. 19	Receipt from USCA for Original Record. filed
Apr. 23	Supplemental Record on Appeal delivered to USCA; Deposit by Stanley O. Sher. \$50.
Apr. 23	Receipt from USCA for Supplemental Record. filed

*Docket Entries*

<u>Date</u>		<u>Proceedings</u>
1965		
Apr. 15	Cooperative for Amer. Relief Everywhere, Inc.	Alexander B. Hawes 815—Conn. Ave., N.W.
Jun. 11	United States of America	David C. Acheson United States Attorney U. S. Courthouse
Aug. 5	Cooperative for Amer. Relief Everywhere, Inc.	Donald D. Webster 1000—Conn Ave. N.W.
Aug. 5	"	Stanley O'Shea 818—18th St., N.W.

**Libel in Suit by Orient Mid-East Lines, Inc. v.  
Cooperative for American Relief Everywhere, Inc.**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
In Admiralty

---

District Court No. 6-65

---

---

ORIENT MID-EAST LINES, INC.  
8-40 Avenida  
Central Apartado 850  
Panama, R. P.

*Libelant,*

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.  
1028 Connecticut Avenue, N. W.  
Washington, D. C. 20006

*Respondent*

---

**LIBEL (Contract)**

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA:

The Libel and Complaint of Orient Mid-East Lines, Inc., in a cause of contract, civil and maritime, alleges upon information and belief as follows:

FIRST: At all times herein mentioned libelant was and still is a corporation incorporated under the laws of Panama

*Libel in Suit by Orient Mid-East Lines, Inc. v.  
Cooperative for American Relief Everywhere, Inc.*

and owner of the m/s ORIENT MERCHANT and time-chartered owner of the m/s OLAU GORM.

SECOND: At all times herein mentioned, respondent, Cooperative for American Relief Everywhere, Inc., was and still is a corporation organized under the laws of New York, registered in the District of Columbia with offices at 1028 Connecticut Avenue, N. W., Washington, D. C.

THIRD: In November and December of 1964 respondent herein, shipped on the m/s ORIENT MERCHANT and on the m/s OLAU GORM certain goods at ports in the Great Lakes pursuant to bills of lading, the terms of which constituted the contracts of shipment. Copies of said bills of lading are hereto annexed and made a part hereof with the same force and effect as if set forth at length. Said bills of lading show the ports and dates of shipment and the ports of discharge, and are marked Exhibits "A" through "L." In consideration of libelants endorsing said bills of lading "Freight Prepaid," respondent executed Due Bills, acknowledging receipt of said prepaid bills of lading, and agreeing to pay the stated ocean freight charges within seventy-two hours after execution of the due bill. Copies of the due bills are affixed hereto as Exhibits "M" through "P" and are incorporated herein as if set forth fully.

FOURTH: After having received said goods on board the ORIENT MERCHANT and OLAU GORM proceeded towards the entrance to the St. Lawrence Seaway with the intention of passing through the Seaway to the destinations named in the bills of lading.

FIFTH: However, prior to arrival at the Seaway, the masters of the said two vessels were informed that the Seaway had been closed for the winter and the libellant, although it used its utmost efforts, was unable to persuade

*Libel in Suit by Orient Mid-East Lines, Inc. v.  
Cooperative for American Relief Everywhere, Inc.*

the authorities controlling the Seaway to allow said vessels to pass through.

SIXTH: Said vessels thereupon, for purposes of safety, sailed for Toronto, Canada, where they still remain, retaining respondent's goods on board at respondent's request.

SEVENTH: Under the said bills of lading and said due bills the libelant became entitled to freight in the amount of \$202,601.32, which respondent refused to pay although demand was duly made.

EIGHTH: Thereafter negotiations took place between libelant and respondent as to payment of said freight and other sums which libelant claimed, and on March 3, 1965 an agreement was entered into between libelant and respondent, copy of which is annexed hereto marked Exhibit "Q," and made part hereof with the same force and effect as if set forth at length.

NINTH: Thereafter, pursuant to Exhibit "Q" respondent paid the freight due under the bills of lading first issued (Exhibits "A" through "L") and, also pursuant to said agreement, respondent surrendered said first bills of lading and libelant issued and respondent received new bills of lading (herein referred to as second bills of lading), copies of which are annexed hereto and marked Exhibits "1" through "12" and made a part hereof with the same force and effect as if set forth at length.

TENTH: The effect of the closure of the Seaway for a period of about four and a half ( $4\frac{1}{2}$ ) months was to terminate and put an end to libelant's obligation to deliver the

*Libel in Suit by Orient Mid-East Lines, Inc. v.  
Cooperative for American Relief Everywhere, Inc.*

goods at destinations pursuant to the first bills of lading and permitted libelant to deal with the goods as provided in clause five of the first bills of lading and other relevant provisions thereof.

ELEVENTH: As a consequence of said change of circumstances and unforeseen delay, libelant became entitled to charge the respondent with sums in addition to the ocean freights under the original bills of lading, to wit: a reasonable sum for keeping said shipments, evidenced by Exhibits "A" through "L" and "1" through "12," on board the vessels above-named during the winter season amounting to Three Hundred Five Thousand One Hundred Nine dollars and Twenty-one cents (\$305,109.21) which sum has been computed on the basis of applicable public storage tariffs in Toronto, Canada; a reasonable freight for carriage of the goods to destination which libelant claims is the same amount as that charged under the first bills of lading, namely, Two Hundred Two Thousand Six Hundred One dollars and Thirty-two cents (\$202,601.32); interest due on the amount of freights stated in the first bills of lading from seventy-two (72) hours after issue of the due bills until paid, namely Three Thousand Thirty dollars (\$3,030.00); all expenses incurred by libelant in obtaining such payments as agreed to by respondent in said due bills which expenses at this time are estimated to be Fifty-five Hundred dollars (\$5,500.00); making the total amount due libelant from respondent Five Hundred Sixteen Thousand Two Hundred Forty dollars and Fifty-three cents (\$516,240.53).

TWELFTH: Payment of said sum has been demanded and refused.

*Libel in Suit by Orient Mid-East Lines, Inc. v.  
Cooperative for American Relief Everywhere, Inc.*

THIRTEENTH: Libelant has performed all conditions on its part to be performed.

FOURTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, libelant prays:

1. That process in due form of law, according to the practice of this Court in causes of admiralty and maritime jurisdiction, may issue against said respondent, citing it to appear and answer on oath the matters aforesaid.

2. That the Court will adjudge and decree that the said respondent pay to libelant its damages aforesaid, together with interest and costs, and that the libelant have such other and further relief in the premises as it may be entitled to receive.

MARVIN J. COLES  
STANLEY O. SHER  
Proctors for Libelant  
1000 Connecticut Avenue, N. W.  
Washington, D. C. 20036

Of Counsel:

HAIGHT, GARDNER, POOR & HAVENS  
80 Broad Street  
New York, New York 10004

COLES & GOERTNER  
1000 Connecticut Avenue, N. W.  
Washington, D. C. 20036

**Libel in Suit by Orient Mid-East Lines, Inc. v. Seventh  
Day Adventist Welfare Service, Inc.**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
In Admiralty

---

District Court No. 7-65

---

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ORIENT MID-EAST LINES, INC.  
8-40 Avenida  
Central Apartado 850  
Panama, R. P.

*Libelant,*

v.

SEVENTH DAY ADVENTIST WELFARE  
SERVICE, INC.  
6840 Eastern Ave., N. W.  
Washington, D. C.

*Respondent.*

---

**LIBEL (Contract)**

TO THE HONORABLE JUDGES OF THE UNITED STATES DIS-  
TRICT COURT FOR THE DISTRICT OF COLUMBIA

The Libel and Complaint of Orient Mid-East Lines,  
Inc., in a cause of contract, civil and maritime, alleges upon  
information and belief as follows:



*Libel in Suit by Orient Mid-East Lines, Inc. v. Seventh Day Adventist Welfare Service, Inc.*

FIRST: At all times herein mentioned libelant was and still is a corporation incorporated under the laws of Panama and owner of the m/s ORIENT MERCHANT.

SECOND: At all times herein mentioned, respondent, Seventh Day Adventist Welfare Service, Inc., was and still is a corporation registered in the District of Columbia with offices at 6840 Eastern Avenue, N.W., Washington, D. C.

THIRD: In November and December of 1964, respondent herein, shipped on the m/s ORIENT MERCHANT certain goods at ports in the Great Lakes pursuant to bills of lading, the terms of which constituted the contracts of shipment. Copies of said bills of lading are hereto annexed and made a part hereof with the same force and effect as if set forth at length. Said bills of lading show the ports and dates of shipment and the ports of discharge, and are marked Exhibits A, B, C, and D. In consideration of libelants endorsing said bills of lading "Freight Prepaid," respondent executed Due Bills, acknowledging receipt of said prepaid bills of lading, and agreeing to pay the stated ocean freight charges within seventy-two hours after execution of the due bill. Copies of the due bills are affixed hereto as Exhibits E and F and are incorporated herein as if set forth fully.

FOURTH: After having received said goods on board, the ORIENT MERCHANT proceeded towards the entrance to the St. Lawrence Seaway with the intention of passing through the Seaway to the destinations named in the bills of lading.

FIFTH: However, prior to arrival at the Seaway, the master of said vessel was informed that the Seaway had

*Libel in Suit by Orient Mid-East Lines, Inc. v. Seventh Day Adventist Welfare Service, Inc.*

been closed for the winter and the libelant, although it used its utmost efforts, was unable to persuade the authorities controlling the Seaway to allow said vessel to pass through.

SIXTH: Said vessel thereupon, for purposes of safety sailed for Toronto, Canada, where it remains, retaining respondent's goods on board at respondent's request.

SEVENTH: Under the said bills of lading and said due bills the libelant became entitled to freight in the amount of \$11,694.92 which respondent refused to pay although demand was duly made.

EIGHTH: Thereafter negotiations took place between libelant and respondent as to payment of said freight and other sums which libelant claimed, and on March 3, 1965, an agreement was entered into between libelant and respondent, copy of which is annexed hereto marked Exhibit G, and made part hereof with the same force and effect as if set forth at length.

NINTH: Thereafter, pursuant to Exhibit G, respondent paid the freight due under the bills of lading first issued (Exhibits A, B, C, and D) and, also pursuant to said agreement, respondent surrendered said first bills of lading and libelant issued and respondent received new bills of lading (herein referred to as second bills of lading), copies of which are annexed hereto and marked Exhibits H, I, J and K and made a part hereof with the same force and effect as if set forth at length.

TENTH: The effect of the closure of the Seaway for a period of about four and a half (4½) months was to

*Libel in Suit by Orient Mid-East Lines, Inc. v. Seventh Day Adventist Welfare Service, Inc.*

terminate and put an end to libelant's obligation to deliver the goods at destination pursuant to the first bills of lading and permitted libelant to deal with the goods as provided in clause five of the first bills of lading and other relevant provisions thereof.

ELEVENTH: As a consequence of said change of circumstances and unforeseen delay, libelant became entitled to charge the respondent with sums in addition to the ocean freights under the original bills of lading, to wit: a reasonable sum for keeping said shipments, evidenced by Exhibits A, B, C, D, H, I, J and K, on board the vessel above-named during the winter season amounting to Twenty One Thousand Thirty Three dollars and Seventy cents (\$21,033.70) which sum has been computed on the basis of applicable public storage tariffs in Toronto, Canada; a reasonable freight for carriage of the goods to destination which libelant claims is the same amount as that charged under the first bills of lading, namely, Eleven Thousand Six Hundred Ninety Four dollars and Ninety Two cents (\$11,694.92); interest due on the amount of freight stated in the first bills of lading from seventy-two (72) hours after issue of the due bills until paid, namely Three Hundred Fifteen dollars (\$315.00); all expenses incurred by libelant in obtaining such payments as agreed to by respondent in said due bills which expenses at this time are estimated to be Three Hundred dollars (\$300.00); making the total amount due libelant from respondent Thirty Three Thousand Three Hundred Forty Three dollars and Sixty Two cents (\$33,343.62).

TWELFTH: Payment of said sum has been demanded and refused.

*Libel in Suit by Orient Mid-East Lines, Inc. v. Seventh  
Day Adventist Welfare Service, Inc.*

THIRTEENTH: Libelant has performed all conditions on its part to be performed.

FOURTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, libelant prays:

1. That process in due form of law, according to the practice of this Court in causes of admiralty and maritime jurisdiction, may issue against said respondent, citing it to appear and answer on oath the matters aforesaid.

2. That the Court will adjudge and decree that the said respondent pay to libelant its damages aforesaid, together with interest and costs, and that the libelant have such other and further relief in the premises as it may be entitled to receive.

MARVIN J. COLES

STANLEY O. SHER

Proctors for Libelant

1000 Connecticut Avenue, N. W.

Washington, D. C. 20036

Of Counsel:

HAIGHT, GARDNER, POOR & HAVENS

80 Broad Street

New York, New York 10004

COLES & GOERTNER

1000 Connecticut Avenue, N. W.

Washington, D. C. 20036

**Libel in Suit by Orient Mid-East Lines, Inc. v. Church  
World Service, Inc.**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
In Admiralty

\_\_\_\_\_  
District Court No. 22-65  
\_\_\_\_\_

————— ♦ —————  
ORIENT MID-EAST LINES, INC.  
8-40 Avenida  
Central Apartado 850  
Panama, R. P.,

*Libelant,*

*v.*

CHURCH WORLD SERVICE, INC.  
c/o  
Mr. Alexander B. Hawes  
815 Connecticut Avenue, N.W.  
Washington, D. C.

*Respondent.*  
————— ♦ —————

**LIBEL (Contract)**

TO THE HONORABLE JUDGES OF THE UNITED STATES DIS-  
TRICT COURT FOR THE DISTRICT OF COLUMBIA:

The Libel and Complaint of Orient Mid-East Lines,  
Inc., in a cause of contract, civil and maritime, alleges upon  
information and belief as follows:

*Libel in Suit by Orient Mid-East Lines, Inc. v. Church  
World Service, Inc.*

FIRST: At all times herein mentioned libelant was and still is a corporation incorporated under the laws of Panama. At all times herein mentioned libelant was the owner of the S/S ORIENT MERCHANT and time-chartered owner of the m/s OLAU GORM.

SECOND: At all times herein mentioned, respondent was and still is a corporation with offices at 475 Riverside Drive, New York, New York. By letter dated August 11, 1965, respondent informed libelant that it had designated, among others, Mr. Alexander B. Hawes, 815 Connecticut Avenue, N. W., Washington, D. C. as its agent to receive process in this action. A copy of that letter is affixed hereto as Exhibit "A" and incorporated herein as if set forth fully.

THIRD: In November and December of 1964 respondent herein shipped on the S/S ORIENT MERCHANT and on the m/s OLAU GORM certain goods at ports in the Great Lakes pursuant to bills of lading, the terms of which constituted the contracts of shipment. Copies of said bills of lading are hereto annexed and made a part hereof with the same force and effect as if set forth at length. Said bills of lading show the ports and dates of shipment and the ports of discharge, and are marked Exhibits "B" through "O". In consideration of libelant endorsing said bills of lading "Freight Prepaid," respondent executed Due Bills, acknowledging receipt of said prepaid bills of lading, and agreeing to pay the stated ocean freight charges within seventy-two hours after execution of the due bill. Copies of the due bills are affixed hereto as Exhibits "P" through "W" and are incorporated herein as if set forth fully.

FOURTH: After having received said goods on board, the ORIENT MERCHANT and OLAU GORM proceeded towards

*Libel in Suit by Orient Mid-East Lines, Inc. v. Church  
World Service, Inc.*

the entrance to the St. Lawrence Seaway with the intention of passing through the Seaway to the destinations named in the bills of lading.

FIFTH: However, prior to arrival at the Seaway, the masters of the said two vessels were informed that the Seaway had been closed for the winter and the libelant, although it used its utmost efforts, was unable to persuade the authorities controlling the Seaway to allow said vessels to pass through.

SIXTH: Said vessels thereupon, for purposes of safety, sailed for Toronto, Canada, where they remained until April, 1965, retaining respondent's goods on board at respondent's request.

SEVENTH: Under the said bills of lading and said due bills, the libelants became entitled to freight in the amount of \$165,968.64, which respondent refused to pay although demand was duly made.

EIGHTH: Thereafter negotiations took place between libelant and respondent as to payment of said freight and other sums which libelant claimed, and on March 3, 1965, an agreement was entered into between libelant and respondent, copy of which is annexed hereto marked Exhibit "X" and made a part hereof with the same force and effect as if set forth at length.

NINTH: Thereafter, pursuant to Exhibit "X", respondent paid the freight due under the bills of lading first issued (Exhibits "B" through "O") and, also pursuant to said agreement, respondent surrendered said first bills of lading and libelant issued and respondent received new bills of lading (herein referred to as second bills of lading), copies

*Libel in Suit by Orient Mid-East Lines, Inc. v. Church  
World Service, Inc.*

of which are annexed hereto and market Exhibits "1" through "14" and made a part hereof with the same force and effect as if set forth at length.

TENTH: The effect of the closure of the Seaway for a period of about four and a half ( $4\frac{1}{2}$ ) months was to terminate and put an end to libelant's obligations to deliver the goods at destinations pursuant to the first bills of lading and permitted libelant to deal with the goods as provided in clause five of the first bills of lading and other relevant provisions thereof.

ELEVENTH: Upon the opening of the Seaway, the OLAU GORM proceeded to the destinations set forth in the second bills of lading and discharged its cargo. The OLAU GORM became entitled to freight in accordance with the second bills of lading, Exhibit "X" and applicable legal principles, which libelant claims is the same amount as charged under the first bills of lading. The ORIENT MERCHANT, on April 27, 1965, under the responsibility of a pilot, was grounded off Port Colborne at the entrance to the Welland Canal. As a result of such grounding, in no way the fault of libelant, the ORIENT MERCHANT became a constructive total loss and was physically unable to carry its cargo to the ports of destination. The voyage therefore was necessarily abandoned and the cargo discharged at various Great Lakes Ports. The effect of this was to terminate and put an end to libelant's obligation to deliver the goods at destinations pursuant to the second bills of lading and libelant thereby became entitled to deal with the goods as provided in clause 5 of the second bills of lading and other relevant provisions thereof. Pursuant thereto libelant became entitled to freight in accordance



*Libel in Suit by Orient Mid-East Lines, Inc. v. Church  
World Service, Inc.*

with the second bills of lading, which is the same amount as that charged under the first bills of lading.

TWELFTH: As a consequence of said change of circumstances and unforeseen delay, libelant became entitled to charge the respondent with sums in addition to the ocean freights under the original bills of lading, to wit: a reasonable sum for keeping said shipments, evidenced by Exhibits "B" through "O" and "1" through "14", on board the vessels above-named during the winter season amounting to Two Hundred Seventy-four Thousand Eight Hundred Eighty-eight Dollars and Fifty-eight Cents (\$274,888.58), which sum has been computed on the basis of applicable public storage tariffs in Toronto, Canada; a reasonable freight under the second bills of lading, as described in paragraph ELEVENTH above, which is the same amount as that charged under the first bills of lading, namely, One Hundred Sixty-five Thousand Nine Hundred Sixty-eight Dollars and Sixty-four Cents (\$165,968.64); interest due on the amount of freights stated in the first bills of lading from seventy-two (72) hours after issue of the due bills until paid, namely, Two Thousand Four Hundred Eighty-nine Dollars and Fifty-three Cents (\$2,489.53); all expenses incurred by libelant in obtaining such payments as agreed to by respondent in said due bills which expenses at this time are estimated to be Four Thousand Five Hundred Dollars (\$4,500.00); making the total amount due libelant from respondent Four Hundred Forty-seven Thousand Eight Hundred Forty-six Dollars and Seventy-five Cents (\$447,846.75).

THIRTEENTH: Payment of said sum has been demanded and refused.

*Libel in Suit by Orient Mid-East Lines, Inc. v. Church  
World Service, Inc.*

FOURTEENTH: Libellant has performed all conditions on its part to be performed.

FIFTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, libellant prays:

1. That process in due form of law, according to the practice of this Court in causes of admiralty and maritime jurisdiction, may issue against said respondent, citing it to appear and answer on oath the matters aforesaid.

2. That the Court will adjudge and decree that the said respondent pay to libellant its damages aforesaid, together with interest and costs, and that the libellant have such other and further relief in the premises as it may be entitled to receive.

MARVIN J. COLES

DONALD D. WEBSTER

1000 Connecticut Avenue, N. W.  
Washington, D. C. 20036

STANLEY O. SHER

818—18th Street, N. W.  
Washington, D. C. 20006

Proctors for Libellant

Of Counsel:

HAIGHT, GARDNER, POOR & HAVENS

80 Broad Street  
New York, New York 10004

COLES & GOERTNER

1000 Connecticut Avenue, N. W.  
Washington, D. C. 20036

**Libel in Suit by Orient Mid-Eastern Lines, Inc. v.  
Lutheran World Relief, Inc.**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
In Admiralty

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District Court No. 34-65

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ORIENT MID-EASTERN LINES, INC.  
8-40 Avenida  
Central Apartado 850  
Panama, R. P.,

*Libelant,*

v.

LUTHERAN WORLD RELIEF, INC.  
c/o  
Mr. Alexander B. Hawes  
815 Connecticut Avenue, N. W.  
Washington, D. C.

*Respondent*

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**LIBEL (Contract)**

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA:

The Libel and Complaint of Orient Mid-Eastern Lines, Inc., in a cause of contract, civil and maritime, alleges upon information and belief as follows:

FIRST: At all times herein mentioned libelant was and still is a corporation incorporated under the laws of Panama.

*Libel in Suit by Orient Mid-Eastern Lines, Inc. v.  
Lutheran World Relief, Inc.*

At all times herein mentioned libelant was the owner of the S/S ORIENT MERCHANT.

SECOND: At all times herein mentioned, respondent was and still is a corporation with offices at 386 Park Avenue South, New York, New York. By letter dated November 8, 1965, respondent informed libelant that it had designated, among others, Mr. Alexander B. Hawes, 815 Connecticut Avenue, N. W., Washington, D. C., as its agent to receive process in this action. A copy of that letter is affixed hereto as Exhibit "A" and incorporated herein as if set forth fully.

THIRD: In early December of 1964 respondent herein shipped on the S/S ORIENT MERCHANT certain goods at the Port of Milwaukee in the Great Lakes pursuant to bills of lading, the terms of which constituted the contracts of shipment. Copies of said bills of lading are hereto annexed and made a part hereof with the same force and effect as if set forth at length. Said bills of lading show the port and dates of shipment and the ports of discharge, and are marked Exhibits "B" through "D". In accordance with said bills of lading respondent paid the freight of Two Thousand Five Hundred Eight-Nine Dollars and Forty-two Cents (\$2,589.42) stated therein.

FOURTH: After having said goods on board, the ORIENT MERCHANT proceeded towards the entrance to the St. Lawrence Seaway with the intention of passing through the Seaway to the destination named in the bills of lading.

FIFTH: However, prior to arrival at the Seaway, the master of the said vessel was informed that the Seaway had been closed for the winter and the libelant, although it used its utmost efforts, was unable to persuade the author-

*Libel in Suit by Orient Mid-Eastern Lines, Inc. v.  
Lutheran World Relief, Inc.*

ities controlling the Seaway to allow said vessel to pass through.

SIXTH: Said vessel thereupon, for purposes of safety, sailed for Toronto, Canada, where it remained until April, 1965, retaining respondent's goods on board at respondent's request.

SEVENTH: Thereafter negotiations took place between libelant and respondent as to payment of certain additional freight and other sums which libelant claimed, and on March 3, 1965, an agreement was entered into between libelant and respondent, a copy of which is annexed hereto marked Exhibit "E" and made a part hereof with the same force and effect as if set forth at length.

EIGHTH: Thereafter, pursuant to Exhibit "E", respondent surrendered said first bills of lading (Exhibits "B" through "D") and libelant issued and respondent received new bills of lading (herein referred to as second bills of lading), copies of which are annexed hereto and marked Exhibits "F" through "H" and made a part hereof with the same force and effect as if set forth in length.

NINTH: The effect of the closure of the Seaway for a period of about four and a half ( $4\frac{1}{2}$ ) months was to terminate and put an end to libelant's obligation to deliver the goods at destinations pursuant to the first bills of lading and permitted libelant to deal with the goods as provided in clause five of the first bills of lading and other relevant provisions thereof.

TENTH: The ORIENT MERCHANT, on April 27, 1965, under the responsibility of a pilot, was grounded off Port Colborne at the entrance to the Welland Canal. As a result

*Libel in Suit by Orient Mid-Eastern Lines, Inc. v.  
Lutheran World Relief, Inc.*

of such grounding, in no way the fault of libelant, the ORIENT MERCHANT became a constructive total loss and was physically unable to carry its cargo to the ports of destination. The voyage therefore was necessarily abandoned and the cargo discharged at various Great Lakes Ports. The effect of this was to terminate and put an end to libelant's obligation to deliver the goods at destinations pursuant to the second bills of lading and libelant thereby became entitled to deal with the goods as provided in clause 5 of the second bills of lading and other relevant provisions, thereof. Pursuant thereto libelant became entitled to freight in accordance with the second bills of lading, which is the same amount as that charged under the first bills of lading.

ELEVENTH: As a consequence of said change of circumstances and unforeseen delay, libelant became entitled to charge the respondent with sums in addition to the ocean freights under the original bills of lading, to wit: a reasonable sum for keeping said shipments, evidenced by Exhibits "B" through "D" and "F" through "H", on board said vessel above-named during the winter season amounting to Three Thousand Seven Hundred Sixty-One Dollars and Thirty-eight Cents (\$3,761.38), which sum has been computed on the basis of applicable public storage tariffs in Toronto, Canada; a reasonable freight under the second bills of lading, as described in paragraph TENTH above, which is the same amount as that charged under the first bills of lading, namely, Two Thousand Five Hundred Eighty-nine Dollars and Forty-two Cents (\$2,589.42); making the total amount due libelant from respondent Six Thousand Three Hundred Fifty Dollars and Eighty Cents (\$6,350.80).

*Libel in Suit by Orient Mid-Eastern Lines, Inc. v.  
Lutheran World Relief, Inc.*

TWELFTH: Payment of said sum has been demanded and refused.

THIRTEENTH: Libelant has performed all conditions on its part to be performed.

FOURTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, libelant prays:

1. That process in due form of law, according to the practice of this Court in causes of admiralty and maritime jurisdiction, may issue against said respondent, citing it to appear and answer on oath the matters aforesaid.

2. That the Court will adjudge and decree that the said respondent pay to libelant its damages aforesaid, together with interest and costs, and that the libelant have such other and further relief in the premises as it may be entitled to receive.

MARVIN J. COLES

DONALD D. WEBSTER

1000 Connecticut Avenue, N. W.  
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STANLEY O. SHER

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Washington, D. C. 20006

Of Counsel:

Proctors for Libelant

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1000 Connecticut Avenue, N. W.

Washington, D. C. 20036

**Motion to Intervene as Respondent in Orient Mid-East  
Lines, Inc. v. Cooperative for American Relief Every-  
where, Inc., Docket No. 6-65.**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
In Admiralty

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District Court No. 6-65

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ORIENT MID-EAST LINES, INC.,

*Libelant,*

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
*Respondent.*

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**MOTION TO INTERVENE AS RESPONDENT**

The United States of America moves this Honorable Court for leave to intervene as respondent herein pursuant to Supreme Court Admiralty Rule 34, Federal Civil Rule 24 and the authority of this Court under its admiralty and maritime jurisdiction, to answer the libel and to assert certain defenses in the form annexed hereto on the grounds that the United States may be bound by any judgment entered in favor of libelant and that its interests herein are not represented by the existing respondent.



*Motion to Intervene as Respondent in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc., Docket No. 6-65.*

This motion is based upon the pleadings herein and upon the Government's supporting memorandum of points and authorities submitted herewith.

/s/ .....  
United States Attorney

DANIEL L. LEACH, Attorney  
Admiralty & Shipping Section  
Department of Justice  
Washington, D. C. 20530  
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Motion to Intervene as Respondent, together with memorandum of points and authorities in support thereof, and the Answer of the United States has been made upon libelant by mailing a copy thereof to its attorney, Marvin Coles, Esquire, Coles & Goertner, 1000 Connecticut Avenue, N. W., Washington, D. C. and upon the respondent by mailing a coy thereof to its attorney, Alexander B. Hawes, Esquire, 815 Connecticut Avenue, N. W., Washington, D. C., this 11th day of June, 1965.

/s/ Robert D. Norris  
ROBERT D. NORRIS  
Assistant United States  
Attorney

**Answer of United States of America in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
In Admiralty

\_\_\_\_\_  
District Court No. 6-65  
\_\_\_\_\_

\_\_\_\_\_  
ORIENT MID-EAST LINES, INC.,  
*Libelant,*

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
*Respondent,*

v.

UNITED STATES OF AMERICA,  
*Respondent-Intervenor.*

\_\_\_\_\_  
**ANSWER**

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The answer of the United States of America, respondent-intervenor, to the libel of Orient Mid-East Lines, Inc., in a cause of contract, civil and maritime, admits, denies and alleges, upon information and belief, as follows:

*Answer of United States of America in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*

FIRST: Respondent-Intervenor admits the allegations of Article First of the libel.

SECOND: Respondent-Intervenor admits the allegations of Article Second of the libel.

THIRD: Respondent-Intervenor denies the allegations of Article Third of the libel, except it admits and avers that at certain times during November and December of 1964, certain goods, owned by the United States and donated to respondent Cooperative for American Relief Everywhere, Inc., under Section 416, of the Agricultural Act of 1949, as amended, 7 U. S. C. 1431 (hereinafter referred to as "donated goods") were loaded aboard the M/S ORIENT MERCHANT and the M/S OLAU GORN and that bills of lading were issued receipting said donated goods on board the vessels. Respondent-Intervenor has not obtained the copies of said bills of lading annexed as Exhibits A through L to libelant's libel, has not compared them with the originals and therefore, neither admits nor denies their authenticity. Respondent-Intervenor admits that the originals of said bills of lading are marked "Freight Pre-payable;" that they show the ports and dates of loading and the ports of discharge. Respondent-Intervenor further admits that due bills were issued following receipt of the bills of lading referred to herein by respondent Cooperative for American Relief Everywhere, Inc. Respondent-Intervenor has not obtained copies of the due bills annexed as Exhibits M through P to libelant's libel, has not reviewed the originals and accordingly neither admits nor denies their provisions.

*Answer of United States of America in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*

FOURTH: Respondent-Intervenor denies the allegations of Article Fourth of the libel.

FIFTH: Respondent-Intervenor denies the allegations of Article Fifth of the libel except it admits and avers that libelant and the masters of the vessels M/S ORIENT MERCHANT and M/S OLAU GORM, at all material times were apprised of the Seaway's actual closure on or about December 5, 1964, said date being five days after the Seaway's official closing date.

SIXTH: Respondent-Intervenor denies the allegations of Article Sixth of the libel, except it admits that said vessels were in port in Toronto, Canada, at the time libelant's libel was filed herein and that said donated goods were at that time on board the vessels pursuant to an agreement dated March 3, 1965, entered into between libelant, respondent Cooperative for American Relief Everywhere, Inc., and respondent-intervenor United States. Respondent-Intervenor refers to said agreement for the provisions thereof.

SEVENTH: Respondent-Intervenor denies the allegations of Article Seventh of the libel.

EIGHTH: Respondent-Intervenor denies the allegations of Article Eighth of the libel, except it admits and avers that negotiations were held between libelant, respondent Cooperative for American Relief Everywhere, Inc., and respondent-intervenor United States, concerning the disposition of said donated goods aboard the vessels M/S

*Answer of United States of America in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*

ORIENT MERCHANT and M/S OLAU GORM, the continuation of the voyages of said vessels and the payment of freight on said donated goods; and that an agreement dated March 3, 1965, was entered into between libelant, respondent Cooperative for American Relief Everywhere, Inc., and respondent-intervenor United States. Respondent-Intervenor has not obtained a copy of the agreement annexed as Exhibit Q to libelant's libel, has not compared it with the original and accordingly neither admits nor denies its authenticity. Respondent-Intervenor refers to said agreement for the provisions thereof.

NINTH: Respondent-Intervenor denies the allegations of Article Ninth of the libel, except it admits that respondent Cooperative for American Relief Everywhere Inc., prepaid all freight due and owing for the carriage of said donated goods by libelant aboard the vessels M/S ORIENT MERCHANT and M/S OLAU GORM from various Great Lakes ports to various foreign ports under the bills of lading referred to in Article Third hereof and that libelant, erroneously claiming additional freight for said shipments, issued additional bills of lading to respondent Cooperative for American Relief Everywhere, Inc., pursuant to the provisions of the aforesaid agreement dated March 3, 1965. Respondent-Intervenor has not obtained copies of said additional bills of lading annexed as Exhibits 1 through 12 to libelant's libel, has not reviewed them and accordingly, neither admits nor denies their authenticity.

TENTH: Respondent-Intervenor denies the allegations of Article Tenth of the libel.

*Answer of United States of America in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*

ELEVENTH: Respondent-Intervenor denies the allegations of Article Eleventh of the libel.

TWELFTH: Respondent-Intervenor denies the allegations of Article Twelfth of the libel, except it admits that libelant improperly demanded a sum as additional freight which was correctly refused by respondent Cooperative for American Relief Everywhere, Inc.

THIRTEENTH: Respondent-Intervenor denies the allegations of Article Thirteenth of the libel.

FOURTEENTH: Respondent-Intervenor denies the allegations of Article Fourteenth of the libel, except it admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

FIRST SEPARATE AND COMPLETE  
DEFENSE TO THE LIBEL

FIFTEENTH: At all times material to the matters alleged in the libel, libelant, its agents and/or representatives and the vessels M/S ORIENT MERCHANT and M/S OLAU GORM failed to use due and proper care in performing their obligations properly and carefully to carry, keep and care for said donated goods as a result of which, the aforesaid vessels with said donated goods aboard became unable to exit the St. Lawrence Seaway during the 1964 navigation season thus preventing the delivery of said goods to their foreign port destinations.

*Answer of United States of America in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*

SECOND SEPARATE AND COMPLETE  
DEFENSE TO THE LIBEL

SIXTEENTH: At all times material to the matters alleged in the libel, libelant, its agents and/or representatives and the vessels M/S ORIENT MERCHANT and M/S OLAU GORM were given prior notice and were fully apprised of the impending Seaway closure. Nevertheless, libelant, its agents and/or representatives and the vessels M/S ORIENT MERCHANT and M/S OLAU GORM improperly failed to observe said notice, failed timely to proceed to exit the Seaway prior to its closure thus causing said vessels with said donated goods aboard to become unable to exit the Seaway during the 1964 navigation season. In the circumstances, libelant is now estopped to rely upon said Seaway closure event as a ground for treating as completed the carriage of said donated goods or for terminating the pertinent affreightment agreements involved.

THIRD SEPARATE AND PARTIAL  
DEFENSE TO THE LIBEL

SEVENTEENTH: At all times material to the matters alleged in the libel, libelant, its agents and/or representatives and the vessel M/S ORIENT MERCHANT agreed to carry a portion of said donated goods from various Great Lakes ports of loading to designated ports of discharge abroad; said donated goods having been delivered in good order and condition to libelant and to said vessel, were received and accepted by them as agreed for carriage and delivery to

*Answer of United States of America in Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*

said foreign ports in the same good order and condition. Following the institution of its libel, however, libelant and its vessel M/S ORIENT MERCHANT improperly refused and continue to refuse so to carry and deliver said donated goods and accordingly libelant is not entitled to the freight already paid for said shipment, nor is libelant entitled to additional freight as is alleged erroneously in its libel.

WHEREFOR Respondent-Intervenor prays that the libel be dismissed and that such other and further relief be granted to the United States as is proper in the premises.

/s/ .....  
United States Attorney

DANIEL E. LEACH, Attorney  
Admiralty & Shipping Section  
Department of Justice  
Washington, D. C. 20530  
Of Counsel



37a

**Order dated June 23, 1965 Granting  
Motion to Intervene**

CLERK'S OFFICE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

WASHINGTON 1, D. C.

June 23, 1965

No. D. C. 6-65

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ORIENT MID-EAST

*vs.*

COOP. FOR AMERICAN RELIEF

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Dear Mr. (Illegible):

In the above entitled cause please be advised that on June 23, 1965, Judge Youngdahl ruled as follows:

"MOTION TO INTERVENE AS RESPONDENT GRANTED."

HARRY M. HULL, Clerk

### Stipulation of Facts

The parties hereto stipulate for the purpose of this action only, without prejudice to their rights to object on grounds of irrelevance or immateriality to any fact or document herein stipulated to, that the following facts are correct and the attached or incorporated documents are genuine:

1. At all times hereinafter mentioned, Orient Mid-East Lines, Inc. was and still is a corporation incorporated under the laws of Panama. At all times hereinafter mentioned, it owned the SS ORIENT MERCHANT and time chartered the MS OLAU GORM. Since the St. Lawrence Seaway opened in 1959, it has operated a common carrier service between Great Lakes and foreign ports.

2. At all pertinent times, the ORIENT MERCHANT and OLAU GORM carried agricultural products shipped by the following voluntary relief agencies: Cooperative for American Relief Everywhere, Inc. (CARE); Seventh Day Adventist Welfare Service, Inc. (Seventh Day Adventists); Church World Service, Inc. (Church World Service); and Lutheran World Relief, Inc. (Lutheran World Relief). Such agricultural products were donated by Commodity Credit Corporation, an agency and instrumentality of the United States, under section 416, Agricultural Act of 1949, as amended, 7 U. S. C. 1431, to such voluntary relief agencies.

3. CARE, Seventh Day Adventists, Church World Service, and Lutheran World Relief have each validly assigned to the United States all their rights, titles, and interests in and to such agricultural products, together with all rights and claims of any nature they might have against any

*Stipulation of Facts*

person, including Orient Mid-East, with respect to such agricultural products. The United States being bound to reimburse such voluntary relief agencies for any judgment Orient Mid-East might have against them in this action, such judgment, if any there be, should be entered either directly or over against the United States.

4. Copies of the following bills of lading issued in November and December 1964, which constituted contracts of carriage with the following voluntary relief agencies, are attached to the complaints herein and are incorporated herein as if fully set forth:

*CARE—ORIENT MERCHANT*

<u>B/L No. &amp; Ports</u>	<u>Exh.</u>	<u>Commodity</u>	<u>Freight</u>
1 Milwaukee-Kunsan	A	18,826 bags cornmeal	\$43,421.69
1 Chicago-Masan	B	3,340 bags cornmeal	7,517.05
2 Chicago-Masan	C	2,861 bags cornmeal	6,455.07
3 Chicago-Manila	D	1,688 bags dried milk	3,824.09
1 Chicago-Cochin	E	20,009 bags dried milk	67,247.50
1 Chicago-Colombo	F	3,988 bags dried milk	14,569.94

*CARE—OLAU GORM*

1 Buffalo-Alexandria	G	12,207 bags flour	17,097.98
2 Buffalo-Alexandria	H	5,000 bags flour	7,003.35
2 Green Bay-Piraeus	I	3,006 bags bulgur	4,275.03
4 Green Bay-Piraeus	J	12,679 bags flour	17,776.83
1 Chicago-Alexandria	K	3,563 bags flour	4,990.58
2 Chicago-Alexandria	L	6,007 bags flour	8,422.21

*Seventh Day Adventists—ORIENT MERCHANT*

3 Milwaukee-Manila	A	1,840 bags rolled wheat	4,772.46
4 Milwaukee-Manila	B	2,500 bags bulgur	3,693.38
1 Milwaukee-Djakarta	C	1,000 cases dried milk	1,259.14
1 Chicago-Manila	D	931 bags cornmeal	1,969.94

*Stipulation of Facts**Lutheran World Relief—ORIENT MERCHANT*

<u>B/L No. &amp; Ports</u>	<u>Exh.</u>	<u>Commodity</u>	<u>Freight</u>
1 Milwaukee-Inchon	B	57 bales layettes	932.69
1 Milwaukee-Kaohsiung	C	525 bags bulgur	828.37
1 Milwaukee-Keelung	D	525 bags bulgur	828.36

*Church World Service—OLAU GORM*

1 Detroit-Skikda	B	2,666 bags beans	6,243.38
1 Milwaukee-Gdynia	C	3,140 cases dried milk	4,647.59
2 Milwaukee-Gdynia	D	3,366 bags dried milk	8,462.09
1 Milwaukee-Piraeus	E	14,999 bags flour	21,186.50
1 Green Bay-Skikda	F	9,260 cases dried milk	17,746.50
1 Green Bay-Piraeus	G	2,974 bags bulgur	4,229.52
3 Green Bay-Piraeus	H	9,939 bags flour	13,935.13
1 Buffalo-Skikda	I	13,970 bags flour	30,009.92
1 Buffalo-Piraeus	J	15,896 bags flour	22,265.04

*Church World Service—ORIENT MERCHANT*

1 Chicago-Kunsan	K	1,166 bags dried milk	2,877.35
1 Chicago-Inchon	L	1,033 bags dried milk	2,495.64
1 Milwaukee-Manila	M	6,667 cases rolled wheat	14,993.14
2 Milwaukee-Manila	N	4,000 bags bulgur	5,953.50
1 Milwaukee-Naha	O	7,000 bags bulgar	10,923.15

5. Lutheran World Relief prepaid its freight. CARE, Church World Service, and Seventh Day Adventists did not. Instead, they executed "due bills" acknowledging receipt of bills of lading which Orient Mid-East marked "freight prepaid." Those due bills, copies of which are attached to the complaints and are incorporated herein as if fully set forth, provide:

"Receipt is hereby acknowledged of Prepaid, negotiable sets of Bills of Lading per

*Stipulation of Facts*

numbered as follows without payment of freight, and in consideration of the acceptance by Orient Mid-East Lines of this Due Bill, it is herewith expressly agreed to pay ocean freight charges in U. S. Currency as undernoted within seventy-two hours after date, the vessel to have a lien on the cargo for full amount of ocean freight charges plus any expenses incidental to the collection thereof until payment has been effected."

6. The following bill of lading clauses, among others, are deemed relevant:

"5. In case of war, hostilities, . . . ice or closure by ice, or the happening of any other matter or event, whether of like nature to those above mentioned or otherwise, whether any of the foregoing are actual or threatened and whether taking place at or near the port of discharge or elsewhere in the course of the voyage and whether or not existing or anticipated before commencement of the voyage, which matters or events, or any of them, in the judgment of the Master or carrier may result in damage to or loss of the vessel . . ., or make it unsafe or imprudent for any reason to proceed on or continue the voyage or enter or discharge cargo at the port of discharge, or give rise to delay or difficulty in reaching, discharging at or leaving the port of discharge, the carrier or Master may . . . (2) whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, discharge the

*Stipulation of Facts*

goods into depot, lazaretto, craft, or other place; or (3) proceed to return, directly or indirectly, to or stop at any port or place whatsoever, in or out of the regular route and short of or beyond the port of discharge as the Master or the carrier may consider safe or advisable under the circumstances and discharge the goods, or any part thereof at any such port or place. When the goods are discharged from the ship, as herein provided, they shall be at the risk and expense of the shipper and/or receivers; such discharge shall constitute complete delivery and performance under this contract, full bill of lading freight and charges shall be deemed earned and the carrier shall be freed from any further responsibility. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation, for which, together with any unpaid freight and charges, the carrier shall have a lien on the goods.

“ . . .

“13. The terms of this bill of lading constitute the contract of carriage. . .

“ . . .

“31. Full freight hereunder to port of discharge or port of destination, if named, shall be considered completely earned on receipt of the goods by the Carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to

*Stipulation of Facts*

receive and retain them under all circumstances whatsoever ships and/or cargo lost or not lost.

"If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere, any forwarding of the goods or any part thereof by vessels of the same line or otherwise shall be at the risk and expense of the goods."

7. St. Lawrence Seaway's Notice No. 10 of 1964, entitled "Closing of Navigation," published from Cornwall, Ontario on November 2, 1964, stated in full as follows:

THE ST. LAWRENCE SEAWAY AUTHORITY

SEAWAY NOTICE

No. 10 of 1964

Closing of Navigation

The formal dates set for the closing of the Seaway Canals are:

South Shore Canal	
(Montreal to Lake St. Louis)	Nov. 30
Beauharnois Canal	Nov. 30
Iroquois Canal	Nov. 30
Lachine Canal	Nov. 30
Cornwall Canal	Nov. 30
Saulte Ste. Marie Canal (Canadian)	Dec. 12
Welland Canal and Third Welland Canal	Dec. 15

Weather and ice conditions could force the Seaway to be closed earlier than these formal dates.

*Stipulation of Facts*

Masters and owners of ocean vessels are advised that it is their responsibility to schedule their passages to ensure clearing the South Shore Canal at St. Lambert before the closing date if they wish to avoid being forced to winter above Montreal, should an early freeze occur this year, as it has in a number of years past.

If favourable climatic conditions prevail later than the formal closing dates, operation of the canals will be continued but, obviously, subject to close on very short notice.

Due to the construction program, and regardless of prevailing climatic conditions, there can be no extension of the Welland Canal closing date of December 15.

R. J. Burnside,  
Director of Operations.

Cornwall, Ontario,  
November 2, 1964

4-13-3-1

8. Attached as Exhibits A and B and incorporated herein as if fully set forth, are two maps, both showing the Great Lakes, the Seaway System, the various locks mentioned, and approximate relevant distances. In addition, Exhibit A shows the itinerary of the ORIENT MERCHANT, and Exhibit B the itinerary of the OLAU GORM.

9. Attached as Exhibit C and incorporated herein as if fully set forth are eight advertisements of the itineraries of the ORIENT MERCHANT and the OLAU GORM.

10. Attached as Exhibit D, and incorporated herein as if fully set forth, is an extract from the log book of



*Stipulation of Facts*

the ORIENT MERCHANT covering the period November 13, 1964 through December 10, 1964, prepared and signed by the then Master of the vessel, Captain Anestis Stamatio Orfanos.

11. Attached as Exhibit E and incorporated herein as if fully set forth is an extract from the log book of the OLAU GORM covering the period November 8, 1964 through December 11, 1964, prepared and signed by the master of the vessel, Captain R. Aarenstrup.

12. The ORIENT MERCHANT left Chicago at 1900 December 1, 1964, having shut out 693 tons of cargo. That same vessel left Milwaukee at 1800 December 3, 1964, shutting out 1,650 tons. The OLAU GORM left Buffalo at 2355 December 5, shutting out 409 tons of cargo. On both vessels space was available to carry the shut-out cargo. The OLAU GORM had a carrying capacity of 6,100 deadweight tons and the ORIENT MERCHANT had a carrying capacity of 11,945 deadweight tons.

13. Since 1959 the formal closing date of the Seaway has been November 30. Since 1959 the Seaway closed on the following dates:

**SEAWAY CLOSED**

1959—December  
1960—December  
1961—December  
1962—December  
1963—December  
1964—December

*Stipulation of Facts*

Between 1959, the year the Seaway opened, and 1964, no vessel seeking to leave the Seaway had been locked in for the winter.

14. For the years 1961-1964 the following number of vessels transited the Seaway in the month of December:

<u>Year</u>	<u>No. of Ships Transiting Seaway</u>
December, 1961	53
December, 1962	54
December, 1963	237
December, 1964	136

15. On November 25, 1964, the Seaway Authority telegraphed Hurum Shipping & Trading Company, Ltd., Orient Mid-East's agent in Canada, as follows:

CORNWALL ONT 25 1129AM EST

HURUM SHIPPING BOARD OF TRADE BLDG  
300 ST SACREMENT ST MTL QUE  
IN THE BEST INTERESTS OF ALL CONCERNED  
WE RESPECTFULLY REQUEST ETA OF OCEAN  
VESSELS FOR SEAWAY TRANSIT RE  
APPROACHING CLOSING OF THE 1964  
NAVIGATION SEASON 1 ETA UPBOUND ST  
LAMBERT LOCK ONE 2 ETA DOWNBOUND  
PORT COLBORNE LOCK EIGHT 3 ETA  
DOWNBOUND IROQUOIS LOCK SEVEN  
D MACKENZIE ST LAWRENCE SEAWAY  
AUTHORITY

ETA 1964 1 ETA 2 ETA 3 ETA  
NOV25/64/1145AKN  
TALASHIP MTL

*Stipulation of Facts*

16. On November 25, 1964, Hurum telegraphed in reply as follows:

NOVEMBER 25th PM

STLAWRENCE SEAWAY AUTHORITIES  
ATT MR D MACKENZIE  
CORNWALL ONTARIO

REYOUR CABLE VESSELS TRANSIT STOP  
UPBOUND NIL STOP DOWNBOUND MS  
MALMANGER ETA IROQUOIS NOV 27/28TH  
AND MT PONTOS ETA IROQUOIS NOV 28TH  
STOP REGARDING ORIENT MERCHANT AND  
OLAU GORM PRESENTLY IN LAKES CONTACT  
OUR PRINSIPALES ORIENT MID EAST LINES  
NEW YORK

HURUM SHIPPING AND TRADING  
BOARD OF TRADE BLDG  
MONTREAL PQ

17. On November 25, 1964, the Seaway Authority telegraphed Orient Mid-East concerning the vessels' expected times of arrival at certain points, as follows:

"IN THE BEST INTERESTS OF ALL CONCERNED  
WE RESPECTFULLY REQUEST ETA OF OCEAN  
VESSELS FOR SEAWAY TRANSIT RE APPROACH-  
ING CLOSING OF THE 1964 NAVIGATION SEASON  
1 ETA UPBOUND ST. LAMBERT LOCK ONE 2  
ETA DOWNBOUND PORT COLBORNE LOCK  
EIGHT 3 ETA DOWNBOUND IROQUOIS LOCK  
SEVEN."

ETA upbound St. Lambert Lock means expected time of arrival upbound at St. Lambert Lock which is the Lock nearest Montreal.

ETA downbound Port Colborne, Lock 8, means the expected time of arrival at the Lock at Port Colborne on the Welland Canal on the Lake Erie side of the Welland Canal.

ETA downbound Iroquois Lock, No. 7, means the expected time of arrival, downbound, at Iroquois Lock which

*Stipulation of Facts*

is the first lock through which a vessel passes when leaving Lake Ontario through the Seaway to Montreal.

The same day, November 25, Orient Mid-East Lines telegraphed the following reply:

"YOURS TODAY ETAs 1 NONE 2 OLAU GORM SEVENTH ORIENT MERCHANT SIXTH 3 OLAU GORM EIGHTH ORIENT MERCHANT SEVENTH RESPECTFULLY REQUEST IMMEDIATE ADVICES EVENT AUTHORITIES DECIDE CLOSE SEAWAY SOONER IN ORDER ATTEMPT ALTER ARRANGEMENTS."

Copies of those telegrams are attached as Exhibits F and G, respectively, and are incorporated herein as if fully set forth.

The seaway made no written response.

18. The OLAU GORM left Buffalo at 2355 December 5, arrived off Cape Vincent at 0015 December 7, and proceeded to Prescott Bay, where she arrived at 1310 that day to await orders. The ORIENT MERCHANT left Milwaukee at 1840 December 3, arriving off Prescott on December 7, at 1347 hours, awaiting transit at Iroquois Lock.

19. The first advice to the OLAU GORM that she would not be accepted into the Iroquois Lock for downbound transit was conveyed to her Master by the Lock Master at the Welland Canal about 0320 Sunday, December 6.

20. The last of the downbound ships (JEAN LAFITTE) then in the System cleared St. Lambert Lock at 0647 December 7, 1964. The last vessel to transit the Iroquois Lock downbound was the MICHIGAN which left Iroquois Lock on December 6, 1964, at 0048 hours. The last upbound transit (i.e., going westward), was made by the HUM-

*Stipulation of Facts*

BERDOC, a Canadian-flag vessel, which left St. Lambert Lock No. 1 on December 6, 1964 at 0330, and left the Iroquois Lock on December 6, 1964 at 2015.

21. After December 1, 1964, 63 ocean-going vessels cleared the St. Lawrence Seaway downbound. Thirteen vessels cleared downbound on December 6 and 7, 1964. Work boats were navigating the Seaway and transiting the Locks doing certain cleanup and maintenance work until December 10, 1964.

22. That the Seaway was closing at midnight December 5, 1964 was broadcast for the first time on December 5, at four-hour intervals, commencing at 1400. Three such broadcasts were made on December 5, and two on December 6. Neither Orient Mid-East, nor the ORIENT MERCHANT, nor the OLAU GORM heard any of these broadcasts. Had Orient Mid-East or either vessel heard the first broadcast, neither vessel was near enough to the Iroquois Lock to have reached it before midnight, December 5, 1964.

23. Two other vessels were locked into the Lakes; a Chinese-flag vessel, the VAN FU, and an American-flag vessel, the American Export-Isbrandtsen Lines' FLYING INDEPENDENT. The FLYING INDEPENDENT sailed from Kenosha, Wisconsin at 0642 hours on December 4 en route to Iroquois Lock No. 7.

24. The freight rates charged by the ORIENT MERCHANT and the OLAU GORM included the cost of loading and discharging cargo; that is, such costs were for the carrier's account. Orient Mid-East's non-conference tariff

*Stipulation of Facts*

ocean freight rates from U. S. Atlantic Coast ports to the same Far Eastern ports of destination as those involved in this proceeding are approximately the same as the freight rates from Great Lakes ports to the same Far Eastern destinations. It costs approximately \$20 per ton average to rail cargo from the Great Lakes to the Eastern Seaboard.

25. On or about December 9, 1964, Eagle Ocean Transport, Inc., general agent in the United States for Orient Mid-East, sent telegrams to the various shippers involved notifying them as follows:

"THIS IS TO ADVISE YOU THAT BECAUSE OF FORCE MAJEURE THE ORIENT MERCHANT AND OLAU GORM ARE UNABLE TO LEAVE THE LAKES AS A CONSEQUENCE OF THE CLOSURE OF THE ST. LAWRENCE SEAWAY. THE VOYAGE HAS THUS BEEN TERMINATED AND THE FREIGHT EARNED. IN ACCORDANCE WITH YOUR REQUEST WE WILL LEAVE THE CARGO ON BOARD THE VESSELS DURING THE WINTER MONTHS. WE SHALL BE GLAD TO DISCUSS WITH YOU THE ADJUSTMENT OF A NEW FREIGHT TO APPLY FOR THE NEW VOYAGE."

That telegram, a copy of which is attached as Exhibit H and is incorporated herein as if fully set forth, was sent to CARE and Church World Service. Except for no mention being made of the OLAU GORM, the same telegram was sent to the Seventh Day Adventists and Lutheran World Relief.

26. Although demand for payment was made, CARE, Church World Service, and Seventh Day Adventists refused to pay any freight under the first bills of lading and the due bills, until execution of the agreement referred to in the following paragraph.

*Stipulation of Facts.*

27. Negotiations commencing on or about December 15, 1964, resulted in the agreement of March 3, 1965, a copy of which is attached hereto as Exhibit I and incorporated herein as if fully set forth. While that agreement speaks for itself, and the parties refer to it for its true and complete meaning, the effect of its six pages may be summarized for ready reference as follows: CARE, Church World Service, Seventh Day Adventists and Lutheran World Relief, having requested Orient Mid-East to retain the cargo on board throughout the period the vessels would be locked into the Lakes, undertook to surrender the bills of lading originally issued and to pay the carrier the full freight due under the bills of lading first issued unless such freight had already been paid. Orient Mid-East, on its part, undertook to have new, second bills of lading issued, copies of which are attached to the libels and are incorporated herein as if fully set forth, and agreed that the OLAU GORM and ORIENT MERCHANT would perform the voyages in accordance with the terms of the second bills of lading when the Seaway opened for navigation in the Spring of 1965. The parties also agreed that if they were unable later to agree upon the amounts, if any, due the carrier in addition to the freight already paid, any party could institute suit in a United States court of competent jurisdiction for resolution of that issue "all parties retaining all rights and defenses they presently have, and this agreement, issuance of the second bills of lading, and the payment provided for in article 1 above shall not be deemed to affect, waive or alter the rights or defenses of any party." They also agreed therein that "the failure of the Carrier physically to exercise any of its claimed rights, including the asserted right to discharge at Great Lakes ports or elsewhere, shall not be deemed to affect

*Stipulation of Facts*

or diminish the amounts and/or rights of the Carrier to any further freight and/or remuneration to which the Carrier may be entitled under the contracts of carriage as evidenced by the second bills of lading and/or the bills of lading first issued."

28. CARE, Church World Service and Seventh Day Adventists paid the freight due under the first bills of lading on the following dates and in the following amounts:

	Date	Amount
CARE		\$202,601.32
Church World Service		165,968.64
Seventh Day Adventists		11,694.92
(Lutheran World Relief	prepaid	2,589.42)

If the Court determines that a second freight is due, in full and without any reduction, that freight shall be the same amount as that set forth immediately above.

29. Should the Court determine that Orient Mid-East is entitled to a second freight, but that such freight should be reduced by expenses not twice incurred, the parties agree that the following deductions would be proper:

St. Lawrence Seaway Tolls	\$ 3,531.90
Agency fees at loading ports	7,838.24
Stevedoring costs for loading	63,543.25
Port expenses at loading ports	8,402.05
Panama Canal Tolls	2,730.07
Stevedoring costs for discharging	5,567.95
Port expenses at discharge ports	7,428.93
Agency fees at discharge ports	3,704.75
Total	<hr/> \$102,747.14



*Stipulation of Facts*

30. In a memorandum dated March 9, 1965 from Mr. Edward Aptaker, Chief, Office of Government Aid, Maritime Administration, Washington, D. C., to the Secretary, Maritime Subsidy Board, subject "American Export-Isbrandtsen Lines, Inc.—Layup of the SS FLYING INDEPENDENT In Excess of 30 Days," Mr. Aptaker reported that the the SS FLYING INDEPENDENT was not permitted to proceed through the Iroquois Lock on December 7, 1964 and that the ship returned to Toledo, Ohio, discharged all cargo and prepared for winter layup. Mr. Aptaker concluded: "A review of the operations of the SS FLYING INDEPENDENT indicates that the layup can be attributed to conditions beyond the control of the operator." He recommended, therefore, that the vessel be retained in subsidized status. His recommendation was approved by the Maritime Subsidy Board on March 24, 1965, signed by James S. Dawson, Jr. A copy of that memorandum is attached as Exhibit J and is incorporated herein as if fully set forth. The FLYING INDEPENDENT had no known mechanical difficulties; her itinerary is attached as Exhibit K hereto.

The pertinent provision of the Maritime Administration's General Order No. 27 reads as follows:

*Right of Administrator to Recover Subsidy for any Period of Idleness.* The Administrator may, prior to payment of subsidy for any voucher period which includes a period of idleness, require the operator to establish to the satisfaction of the Administrator that such period of idleness could not have been prevented in whole or in part through the most efficient and economical operation. The Administrator may recover any payment of subsidy for any item of expense allocable to such period of idleness which in the opinion of

*Stipulation of Facts*

the Administrator could have been avoided by efficient and economical operation. 46 C. F. R. 281.5.

31. Subsequent to March 15, 1965, the present complaints were filed in the United States District Court for the District of Columbia.

32. Throughout the period when the ORIENT MERCHANT and the OLAU GORM were berthed at Toronto, Orient Mid-East stored and cared for the cargo, and informed defendants that it was rendering services to the cargo. See the copy of letter dated December 15, 1964 from Mr. Pendias to the Food for Peace Division, AID, State Department, and the copy of a letter dated December 18, 1964 from Mr. Pendias to Captain S. Orfanos, Master of the ORIENT MERCHANT, copies of which are attached as Exhibits L and M, respectively, and are incorporated herein as if fully set forth. By memorandum dated February 18, 1965 to Mr. W. A. McGannon, Chief Storage Management Division, USDA, Mr. Henry Reich, USDA Warehouse Examiner, reported that he had inspected the cargo in both vessels and that he was in full agreement with two other inspectors and that "the present condition of the visible cargo in accessible holds could not justify our recommendation to unload the merchandise for storing." A copy of that memorandum is attached as Exhibit N and incorporated herein as if fully set forth. No pilferage or spoilage of the cargo occurred while it was thus stored.

33. If the cargo loaded for each voluntary agency had been discharged and stored at Toronto for the period the vessels were idle there (that is, for the ORIENT MERCHANT from December 12, 1964—April 9, 1965, and for

*Stipulation of Facts*

the OLAU GORM from December 12, 1964—April 7, 1965), the charges against each voluntary agency, assuming the demurrage charges stated on pages 16 and 17 of the Port of Toronto's public tariff are applicable, would have been as follows:

CARE	\$282,815.81
Church World Service	265,804.00
Seventh-Day Adventists	19,797.21
Lutheran World Relief	3,761.50

A copy of such Tariff is attached hereto as Exhibit O.

34. After leaving her winter berth in Toronto, the OLAU GORM sailed from the Great Lakes on April 10, 1965, completing her voyage and discharging her cargo without relevant incident. Orient Mid-East has demanded payment of \$188,291.84 in freight which it claims is due under the second bills of lading. Defendants have refused to pay.

35. The ORIENT MERCHANT, on leaving her winter berth in Toronto, sailed to Duluth, Chicago, and Milwaukee, where she loaded cargoes for each of the voluntary agencies defendants herein. None of the defendants raised any objection to the ORIENT MERCHANT's thus taking on additional cargo at the above-named ports.

36. About 0415 April 27, 1965, the ORIENT MERCHANT ran aground in a heavy fog while attempting to enter the Welland Canal, off Port Colborne. At the time of the grounding, her master and a compulsory Great Lakes pilot, among others, were on her bridge. The pilot, who was licensed by the United States, was giving commands.

37. Efforts to refloat the ORIENT MERCHANT were not successful. See letter of July 13, 1965, from Frank B. Hall

*Stipulation of Facts*

& Co., Inc., to Orient Mid-East, attached hereto as Exhibit P and incorporated herein as though set forth at length.

38. On May 3, 1965, Eagle Ocean Transport, Inc., sent a telegram to the Department of Justice, stating that the ORIENT MERCHANT had grounded near Port Colborne about 0500 April 27, 1965. A copy is attached as Exhibit Q and is incorporated herein as if fully set forth.

39. On May 5, 1965, Orient Mid-East's attorneys wrote to the Commodity Credit Corporation, Department of Agriculture, referring to discussions between those attorneys and representatives of the Department of Agriculture and Justice regarding the stranding of the ORIENT MERCHANT near Port Colborne. The attorneys' letter referred to the fact that they had previously advised the Commodity Credit Corporation that it should send a representative to follow the salvage operation.

40. In Eagle Ocean's letter of May 25, 1965 to the various shippers involved, a copy of which is attached as Exhibit R and is incorporated herein as if fully set forth, it gave notice that the ORIENT MERCHANT on April 27, 1965, grounded in heavy fog outside Port Colborne, adding in part:

"By the aid of a salving company, she was finally brought to a repair yard in Port Weller in the Welland Canal. It then became evident that the cost of repairs to enable the vessel to continue her voyage to the Far East would much exceed her value when repaired. These repairs could not be undertaken until the cargo now on board was discharged, and discharge could not take place at Port Weller because of lack of facilities.

*Stipulation of Facts*

"As soon as the ORIENT MERCHANT can be put in such condition that she can safely be brought to Toronto, she will be brought there and her cargo discharged and put at the disposition of the bill of lading holders, subject to liens for general average, etc.

"In view of all of the above circumstances, owners are forced to notify you that upon completion of the discharge at Toronto, the voyage will be abandoned.

"All rights to general average and under the bill of lading contract are reserved."

41. On or about May 27, 1965, Orient Mid-East's attorneys notified the Department of Agriculture, Commodity Credit Corporation, that the ORIENT MERCHANT would be towed from Port Weller to Toronto on May 28 or 29, 1965, for discharge at Toronto, and a request was made that the Commodity Credit Corporation make arrangements for receipt of the cargo immediately thereafter. On June 2, 1965, Mr. Roland F. Ballou, Deputy Administrator, Commodity Operations Agricultural Stabilization and Conservation Service, sent a telegram to Mr. Lyras of Eagle Ocean Transport reading as follows:

RE S/S ORIENT MERCHANT STRANDED GREAT LAKES. COMMODITY CREDIT CORPORATION HAS NO OBJECTION YOUR DISCHARGING CCC CARGO AT PORT OF TORONTO, CANADA. MR. HENRY REICH OF USDA WILL REPRESENT MINNEAPOLIS ASCS COMMODITY OFFICE IN THE HANDLING AND STORAGE OF THE COMMODITY

A copy of that telegram is attached as Exhibit S and is incorporated herein as if fully set forth.

*Stipulation of Facts*

42. The cargo of the ORIENT MERCHANT was discharged at Toronto and not reloaded, delivery being made to the parties entitled thereto in accordance with the bills of lading. Upon her arrival at Toronto her owners declared the ORIENT MERCHANT a constructive total loss. It was estimated that the repairs to the ORIENT MERCHANT would take approximately 128 days during which time the cargo would be subject to deterioration. USDA informed Orient Mid-East that even if the vessel could be rebuilt and the voyage continued in three or four months, the cargo of defendant agencies could not be carried by the ORIENT MERCHANT as the additional three or four months would result in deterioration and spoilage of the cargo, particularly the cornmeal.

43. Orient Mid-East is an experienced operator of vessels in the Great Lakes, having since the opening of the Seaway in 1959 operated the following number of round-trip voyages to the Lakes each year:

1959 — 1
1960 — 8
1961 — 16
1962 — 17
1963 — 16
1964 — 12

With the exception of the voyages of the ORIENT MERCHANT and OLAU GORM here involved, none of these voyages ever resulted, as here, in any vessel being locked into the Great Lakes.

44. The execution of this Stipulation shall not preclude any party from offering evidence as to matters not covered herein.

**Amendment No. 1 to Stipulation of Facts**

IN THE  
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

In Admiralty

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District Court Nos. 6-65,  
7-65, 22-65, 34-65

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ORIENT MID-EAST LINES, INC.,

*Plaintiff,*

*v.*

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
CHURCH WORLD SERVICE, INC., AND LUTHERAN WORLD  
RELIEF, INC.,

*Defendants,*

and

UNITED STATES OF AMERICA,

*Defendant-Intervenor.*

---

(1) The parties agree that Paragraph No. 13 of the "Stipulation of Facts" filed with the Court on September 29, 1966, and incorporated in the Pre-Trial Proceedings be eliminated in its entirety and in lieu thereof the following be substituted:

"13. Since 1959 the formal closing date of the Seaway has been November 30. The dates upon which the last oceangoing vessel passed downbound

*Amendment No. 1 to Stipulation of Facts*

(seaward) through St. Lambert Lock are as follows (where a later transit by an inland vessel is involved, such date is shown in parentheses):

1959 — December 3  
 1960 — December 2 (December 3)  
 1961 — December 2 (Upbound—December 5)  
 1962 — December 7  
 1963 — December 10 (December 13).

It takes approximately one day for either the OLAU GORM or ORIENT MERCHANT to transit the St. Lawrence Seaway from Iroquois to St. Lambert Lock. An inland vessel trades on the Great Lakes and inland rivers and is not seagoing. For the purposes of this litigation and for the purposes of transiting the Seaway, when an inland vessel is capable of transiting, so is an oceangoing vessel of comparable size and speed and vice versa.

Between 1959, the year the Seaway opened, and 1964, no vessel seeking to leave the Seaway had been locked in for the winter.

The following vessels, owned or chartered by plaintiff Orient Mid-East Lines passed St. Lambert Lock downbound on the following dates:

CARLO MARTINOLICH — December 2, 1961  
 ORIENT TRADER — December 2, 1961  
 CARLO MARTINOLICH — December 1, 1962  
 PROCYON — December 4, 1963  
 ORIENT MERCHANT — December 6, 1963  
 HERMION — December 7, 1963  
 ZENOBIA MARTINI — December 10, 1963"



*Amendment No. 1 to Stipulation of Facts*

(2) The parties agree that in paragraph No. 28 of said Stipulation of Facts the following dates be inserted in the blank spaces:

CARE	— "March 16, 1965"
Church World Service	— "March 10, 1965"
Seventh Day Adventists	— "March 19, 1965"

Respectfully Submitted,

DONALD D. WEBSTER

.....  
Counsel for Plaintiff

.....  
Counsel for Defendant in Nos.  
6-65, 22-65 and 34-65

.....  
Counsel for Defendant  
in No. 7-65

.....  
Counsel for Defendant-Inter-  
venor, United States  
of America

APPROVED:

.....  
Pre-Trial Examiner

**Amendment No. 2 to Stipulation of Facts**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
In Admiralty

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[SAME TITLE]

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The parties agree that the "Stipulation of Facts" filed with the Court on September 29, 1966, and incorporated in the Pre-Trial Proceedings be amended by adding the following paragraph at the end of Paragraph No. 12 of said Stipulation:

"CARE cargo arrived at Chicago on the following dates:

- (a) 19 railroad cars arrived during the last 10 days of October, 1964;
- (b) 25 railroad cars arrived between November 16 and November 24, 1964;
- (c) 7 railroad cars arrived on November 25; and
- (d) 4 railroad cars arrived on November 30, which were not loaded aboard the ORIENT MERCHANT and were railed to Norfolk, Virginia, at plaintiff's expense.

The foregoing arrival dates do not mean arrival at the pier in Chicago, but rather at the rail yards in Chicago, further ar-

*Amendment No. 2 to Stipulation of Facts*

rangements being required to move the railroad cars to the pier."

Respectfully Submitted,

.....  
Counsel for Plaintiff

.....  
Counsel for Defendant-  
Intervenor, United States  
of America

APPROVED:


.....  
Pre-Trial Examiner

# FROM GREAT LAKES-ST. LAWRENCE- CANADA EAST COAST TO

FAR EAST

THE JOURNAL OF COMMERCE

Friday, November 6, 1964



562

**ORIENT MID-EAST LINES**  
Great Lakes Service

YOSU, KUNSAN, PUSAN, IN-  
CHON, NAHA, KEELUNG,  
HONG KONG, MANILA,  
SAIGON, TOURANE,  
DJAKARTA, SINGAPORE


**ORIENT MERCHANT**

Delphi	Nov. 11
Chakra	Nov. 11
Kenaka	Nov. 11
Manila	Nov. 11
East Haven	Nov. 11
Delphi	Nov. 11
Chakra	Nov. 11
Kenaka	Nov. 11
Manila	Nov. 11
East Haven	Nov. 11

**EAGLE OCEAN TRANSPORT, Inc.**  
23 BROADWAY, N.Y. VII 4-4111

General Agents  
133 North Water St., Milwaukee  
111 4-4111

Tuesday, November 10, 1964



562

**ORIENT MID-EAST LINES**  
Great Lakes Service

YOSU, KUNSAN, PUSAN, IN-  
CHON, NAHA, KEELUNG,  
HONG KONG, MANILA,  
SAIGON, TOURANE,  
DJAKARTA, SINGAPORE


**ORIENT MERCHANT**

Delphi	Nov. 13
Chakra	Nov. 13
Kenaka	Nov. 13
Manila	Nov. 13
East Haven	Nov. 13
Delphi	Nov. 13
Chakra	Nov. 13
Kenaka	Nov. 13
Manila	Nov. 13
East Haven	Nov. 13

**EAGLE OCEAN TRANSPORT, Inc.**  
23 BROADWAY, N.Y. VII 4-4111

General Agents  
133 North Water St., Milwaukee  
111 4-4111

Friday, December 4, 1964



562

**ORIENT MID-EAST LINES**  
Great Lakes Service

YOSU, KUNSAN, PUSAN, IN-  
CHON, NAHA, KEELUNG,  
HONG KONG, MANILA,  
SAIGON, TOURANE,  
DJAKARTA, SINGAPORE


**ORIENT MERCHANT**

Delphi	Nov. 15
Chakra	Nov. 15
Kenaka	Nov. 15
Manila	Nov. 15
East Haven	Nov. 15
Delphi	Nov. 15
Chakra	Nov. 15
Kenaka	Nov. 15
Manila	Nov. 15
East Haven	Nov. 15

**EAGLE OCEAN TRANSPORT, Inc.**  
23 BROADWAY, N.Y. VII 4-4111

General Agents  
133 North Water St., Milwaukee  
111 4-4111

Tuesday, December 8, 1964



562

**ORIENT MID-EAST LINES**  
Great Lakes Service

YOSU, KUNSAN, PUSAN, IN-  
CHON, NAHA, KEELUNG,  
HONG KONG, MANILA,  
SAIGON, TOURANE,  
DJAKARTA, SINGAPORE

**ORIENT MERCHANT**

Delphi	Nov. 17
Chakra	Nov. 17
Kenaka	Nov. 17
Manila	Nov. 17
East Haven	Nov. 17
Delphi	Nov. 17
Chakra	Nov. 17
Kenaka	Nov. 17
Manila	Nov. 17
East Haven	Nov. 17

**EAGLE OCEAN TRANSPORT, Inc.**  
23 BROADWAY, N.Y. VII 4-4111

General Agents  
133 North Water St., Milwaukee  
111 4-4111

# From GREAT LAKES-ST. LAWRENCE CANADA EAST COAST to

## MEDITERRANEAN

THE JOURNAL OF COMMERCE

Exhibit C Attached to Stipulation of Facts

65a

Friday, November 6, 1964

529



### ORIENT MID-EAST LINES Great Lakes Service

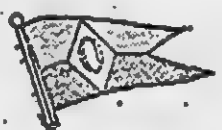
RIJEKA, PIRAEUS, ALEXAN-  
DRIA, BEIRUT, LATAKIA,  
PORT SAID, AQABA, JEDDAH

	Orient Mariner	Olan Gorm
Chicago	Nov. 10	Nov. 12
Kenosha		Nov. 14
Milwaukee		Nov. 16
Port Huron	Nov. 12	Nov. 18
Detroit		Nov. 20
Tulsa		Nov. 22
Buffalo	Nov. 14	Nov. 24
Toronto		Nov. 26
Montreal	Nov. 16	Nov. 28

EAGLE OCEAN TRANSPORT, Inc.  
15 BROADWAY, N. Y. WH 4-5743  
General Agents  
Eagle Ocean Transport Agency, Inc.  
125 North Water St., Milwaukee  
BR 6-5751  
Chicago: Midland Overseas  
MT 6-1650

Tuesday, November 10, 1964

529



### ORIENT MID-EAST LINES Great Lakes Service

RIJEKA, PIRAEUS, ALEXAN-  
DRIA, BEIRUT, LATAKIA,  
PORT SAID, AQABA, JEDDAH

	Orient Mariner	Olan Gorm
Chicago	Nov. 12	Nov. 21
Kenosha		Nov. 23
Milwaukee		Nov. 25
Port Huron	Nov. 20	Dec. 1
Detroit		Dec. 3
Tulsa		Dec. 5
Buffalo	Nov. 22	Dec. 8
Toronto		Dec. 10
Montreal	Nov. 24	Dec. 12

EAGLE OCEAN TRANSPORT, Inc.  
15 BROADWAY, N. Y. WH 4-5743  
General Agents  
Eagle Ocean Transport Agency, Inc.  
125 North Water St., Milwaukee  
BR 6-5751  
Chicago: Midland Overseas  
MT 6-1650

Friday, December 4, 1964

529



### ORIENT MID-EAST LINES Great Lakes Service

RIJEKA, PIRAEUS, ALEXAN-  
DRIA, BEIRUT, LATAKIA,  
PORT SAID, AQABA, JEDDAH

	Olan Gorm
Kenosha	
Milwaukee	
Port Huron	Dec. 1
Detroit	
Tulsa	Dec. 1
Buffalo	Dec. 3
Toronto	Dec. 5
Montreal	Dec. 7

EAGLE OCEAN TRANSPORT, Inc.  
15 BROADWAY, N. Y. WH 4-5743  
General Agents  
Eagle Ocean Transport Agency, Inc.  
125 North Water St., Milwaukee  
BR 6-5751  
Chicago: Midland Overseas  
MT 6-1650

Tuesday, December 8, 1964

529



### ORIENT MID-EAST LINES Great Lakes Service

RIJEKA, PIRAEUS, ALEXAN-  
DRIA, BEIRUT, LATAKIA,  
PORT SAID, AQABA, JEDDAH

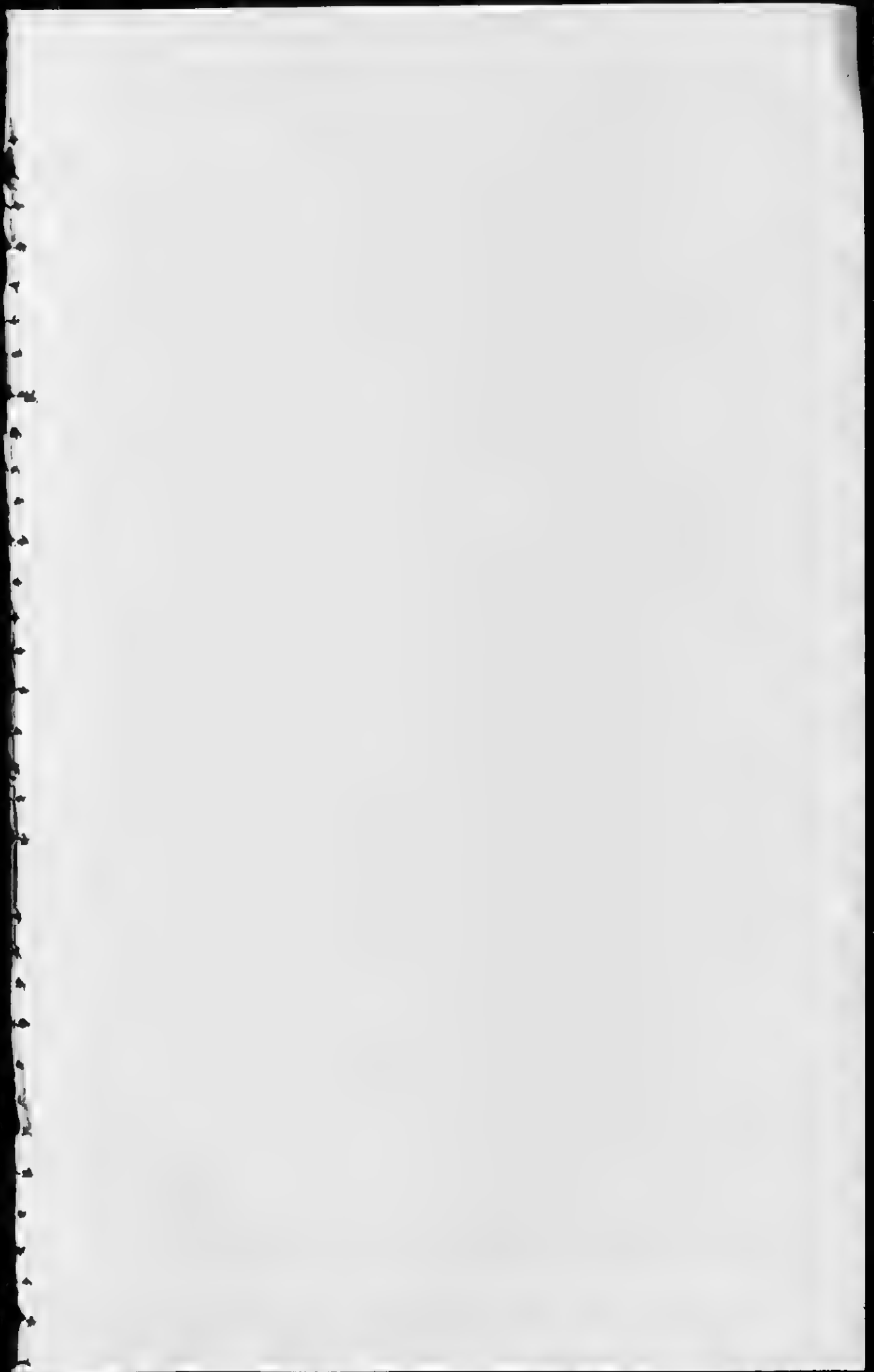
	Olan Gorm
Montreal	Dec. 8

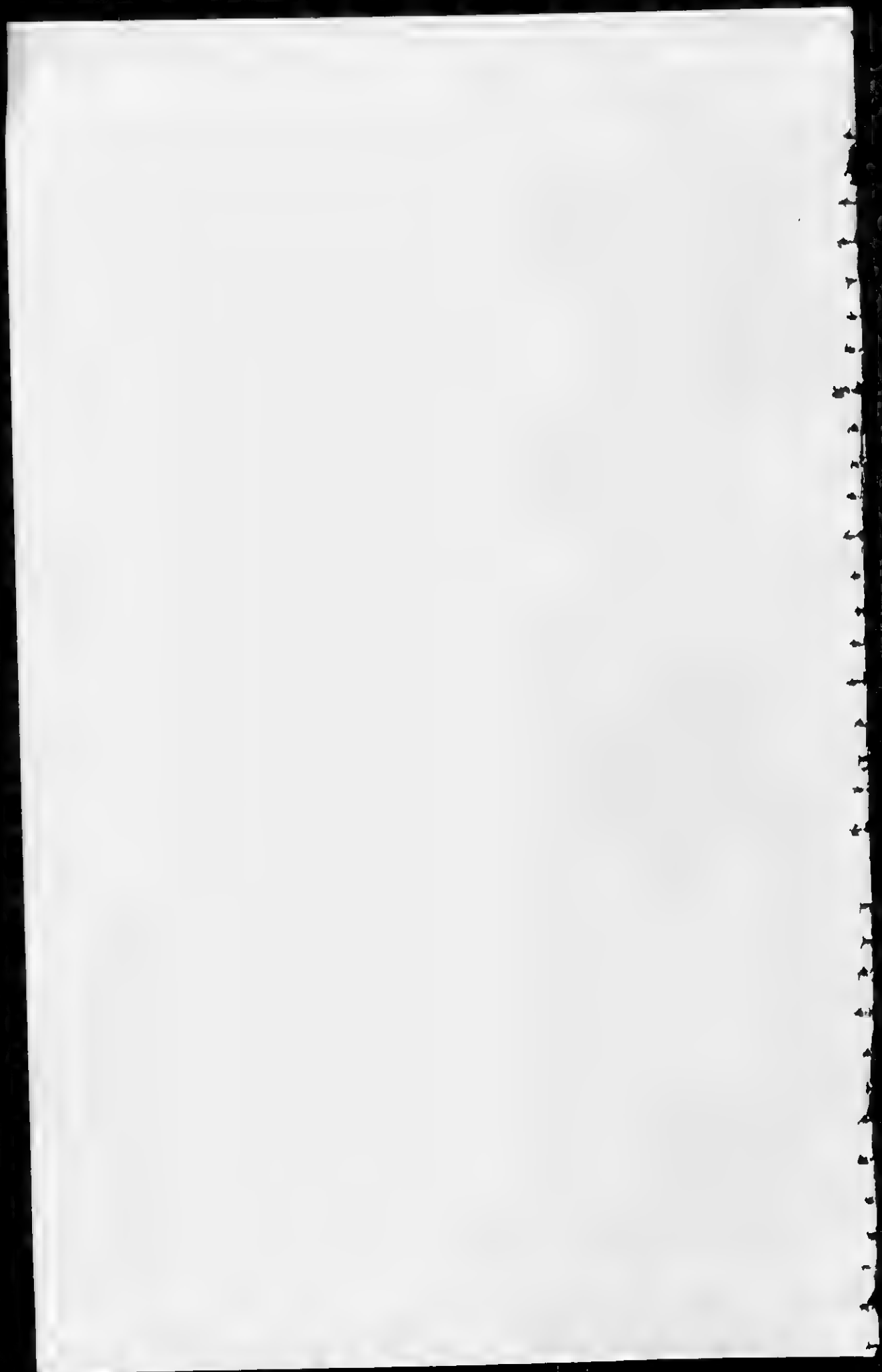
EAGLE OCEAN TRANSPORT, Inc.  
15 BROADWAY, N. Y. WH 4-5743  
General Agents  
Eagle Ocean Transport Agency, Inc.  
125 North Water St., Milwaukee  
BR 6-5751  
Chicago: Midland Overseas  
MT 6-1650

## Exhibit D Attached to Stipulation of Facts

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
Friday, Nov. 13 1845 hrs.				Engine ready, repairs suspended due to insufficient time. Some of the damages were not completed.
1920				Let go lines. We proceeding away from the pier.
1950				Let go tug boats. Harbor pilot disembarked. Proceeding down the river.
2215				We anchored awaiting to go through Chesapeake & Delaware Canal. Draft sailing Baltimore fwd. 7'3" aft 21'10", fuel 790 tons, diesel 53 tons, fresh-water 530 tons.
Saturday, Nov. 14 0120				Heaving up anchor, proceeding to the Canal.
0230				Changed pilots, entering the Canal.
0450				Leaving the Canal.
0825	NW2	100		Pilot disembarked, proceeding full speed ahead to Chicago. Course as opposite. From Baltimore to pilot station at Delaware River distance 114 miles in 12 hours 35 mins.
1005		067		A beam 5 fathoms light vessel, distance 1 mile. Changed course as opposite.
1205				Stopped due to engine trouble.
noon	NW4	067	48	LA38°57N, LO74°03W, dis. 48 miles in 3 hours 23 mins., A. S. 14.17. Fair moderate swell, visability good, barometer 30.12.
1245				Full speed ahead to our destination.
Sunday, Nov. 15 0900		049		Changed course as opposite.







*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
noon	NW5	047	330	LA 41°06N, LO 67°28W, DIS. 330 miles in 24 hours 00 mins., A.S. 13.75. Clear/moderate sea, visibility good, barometer 29.96.
00	NW5	047		Clear, rough sea, visibility good.
Monday, Nov. 16				
00	NW4/5	047		Cloudy, rough sea, visibility good.
15		040		Changed course as opposite.
noon	NW4	040	290	LA 43°52N, LO 62°05W, IDS. 290 miles in 24 hours 00 mins., A.S. 12.08 (reckoning position), cloudy, moderate sea, visibility good, barometer 29.70.
32	NW3	360		Changed course as opposite.
55	NW3	335		" " " "
Tuesday, Nov. 17				
00	NW3	335		Heavy snow. We observe the rules of the road.
40		325		Abeam St. Paul Island, distance 6 miles. Changed course as opposite. Visibility poor due to snowfall.
15		299		Changed course as opposite.
noon	NE4	300	355	LA 48°21N, LO 62°17W, DIS. 355 miles in 24 hours 00 mins., A. S. 14.79, cloudy with snowfall, moderate swell, visibility moderate to poor.
00	SW3	270		Cloudy, light swell, visibility moderate to good.
Wednesday, Nov. 18				
35		248		Changed course as opposite.
25		235		" " " "
45				Proceeding slow, near pilot station Escoumains. From noon to pilot 309 miles in 22 hours 45 mins. A. S. 13.61.

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*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK      SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
1100				Pilot boarded, full speed ahead for Montreal.
1922				Changed pilot at Quebec.
Thursday, Nov. 19				
0145				Changed pilot at Three Rivers.
0630				Slow, near Montreal anchorage.
0700				We anchored waiting the Control of the Harbor Authorities, draft fwd. 7'0" aft 21'0", fuel 524/45, F. W. 156.
1000				Finished with Harbor Authorities. Pilot boarded.
1100				We were notified by the Harbor Master to proceed towards the entrance of the Canal.
1115				Heaving up anchor. We proceeding towards the entrance, draft 8'0" fwd 20'0" aft.
1245				Moored outside St. Lambert Lock waiting in line to enter.
1340				We were notified by the Control of the Beauharnois to stay in our position due to bad visibility due to heavy snowfall. Temperature 32°F.
2000				Visibility improved, entering St. Lambert Lock.
2130				Leaving St. Lambert Lock. During the exit and due to strong ESE wind (25 to 30 miles), the after end of the ship struck the cable of the elevator arm of the protecting guard at the entrance of the Lock and pulled away. This cable fell to the poop deck and caused damages to the rails and guards.

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*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
2230				After instructions from the Seaway Authorities, we moored outside the St. Catherine Lock for inspection and preparing report of the damages to the lock and the vessel.
Friday Nov. 20 215				After we gave to the responsible Seaway authorities written report regarding the damages to the fender of the St. Lambert Lock, we were permitted to proceed through the Seaway.
225				We proceeding towards St. Catherine Lock.
340				While we were entering the St. Catherine Lock the upper platform of the starboard accommodation ladder struck the corner of the lock and destroyed it.
400				Leaving St. Catherine Lock.
515				Entering the lower Beanharnois Lock.
535				Leaving lower Beanharnois Lock.
600				Entering upper Beanharnois Lock.
720				Leaving upper Beanharnois Lock, proceeding towards Snell Lock.
850				Due to strong wind (45 miles) we ordered by the Snell Lock authorities to anchor and waiting improved weather.
950				Weather improved. We heaving up anchor and proceeding towards the Snell Lock.
1055				Moored outside Snell Lock.
1125				Entering Snell Lock and changed pilots. Fair weather, calm, temperature 38°F.
1245				Leaving Snell Lock.

*Exhibit D Attached to Stipulation of Facts*

EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
Friday, Nov. 20				Entering Eisenhower Lock.
1935				Leaving Eisenhower Lock.
1955				Entering Iroquois Lock.
2210				Leaving Iroquois Lock.
2230				We anchor due to bad visability and heavy snowfall.
2355				
Saturday, Nov. 21				Weather conditions improved, proceeding our destination.
0325				
0412	SW7			Due snow storm (SW7) we anchor with both anchors, maneuvering with the engine at the same time in order to keep the vessel at the middle of the channel.
0715				Weather conditions improved, we proceeding to our destination.
0800				We anchor due snow storm. The carpenter, Athanasios Papakalodonka complained of severe and unbearable pains in his waist and legs and, as related to me, he slipped on the deck hitting his back while he was going and coming several times to and from the bow for the purpose of dropping and taking up the anchor. Because of the seriousness of his condition, called by radio telephone to the nearest Alexandria Bay, N. Y. Coast Guard and I requested that a doctor be sent aboard the ship.
0850				Taking up anchor, proceeding full speed ahead to Alexandria Bay, N. Y. to meet the doctor.

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*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
1000				Proceeding very slow, the doctor boarded the vessel, examined the carpenter and deemed it necessary to transfer him to the hospital for X-ray tests.
1100				After the necessary preparations, the carpenter, Athanasios Papakalodonkas, was transferred by stretcher to the Coast Guard boat, as per doctor's instructions. Full speed ahead to our destination, Milwaukee.
235				Changed pilots at Cape Vincent. From Montreal to Cape Vincent DIS. 165 miles in 49 hours 20 mins.
Saturday, Nov. 21 600	WSW8	255		Cloudy, very rough seas, visibility good. Because the ship is pitching dangerously we are forced to reduce revolutions to 75 in order to avoid damages.
000	WSW7	255		Same weather conditions. We are proceeding reduced speed due to vessel's dangerous pitching.
Sunday, Nov. 22 400	WSW8	256		Cloudy, very rough seas, visibility good. Vessel rolling and pitching, proceeding with reduced speed.
555				Proceeding slowly outside Port Weller.
630				We anchored outside Port Weller waiting for improved weather conditions. From Cape Vincent to Port Weller DIS. 137.5 miles in 17 hours 20 mins. A.S. 7.95.
800	WSW7			Weather conditions the same, temperature 26°F.
400				Waiting weather improvement.
Monday, Nov. 23 620				Strong winds W 30 miles.

*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
1200				Clear, very rough seas, wind 25 to 30 miles. I requested information from the Welland Radio regarding our entering the Canal and I was informed that under the present weather conditions it is impossible and with all probability will have to wait until late tonight when they expect the wind to die down.
1945				Wind diminished, pilot boarded.
2010				Taking up anchor, proceeding toward the entrance of the Welland Canal.
2110				Moored outside #1 lock.
2210				Entered #1 lock.
2230				Leaving #1 lock.
2300				Moored outside #2 lock.
2330				Entering #2 lock.
2350				Leaving #2 lock.
Tuesday, Nov. 24				Entering #3 lock.
0040				
0100				Leaving #3 lock.
Tuesday, Nov. 24				
0130				Entering #4 lock.
0210				Leaving #4 lock.
0225				Entering #5 lock.
0255				Leaving #5 lock.
0310				Entering #6 lock.
0410				Leaving #6 lock.
0430				Moored outside #7 lock.
0610				Entering #7 lock, changed pilots.
0625				Leaving #7 lock.

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*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
0640				Moored outside #7 lock.
0725				Under way from the mooring berth towards #8 lock.
0845				Entering #8 lock.
1010				Leaving #8 lock.
1030				Leaving the Canal. Full speed ahead. Welland Canal DIS. 22.5 miles in 14 hours 20 mins.
045	SW3	241		Changed course as opposite.
0340				Reduced speed near Detroit channel. From Port Colborne to Detroit River entrance DIS. 186 miles in 13 hours 10 mins. A. S. 14.10.
Wednesday, Nov. 25				
000				Proceeding through Detroit River with various maneuvers.
0620				Anchored in Detroit River near Sarnia due to rudder trouble (grounding of the automatic resistance of the panel for distributing power to the rudder).
0810				Heaving up anchor, proceeding our destination after repairing the damaged rudder.
0850				Changed pilots at Port Huron.
0930	Calm	353		Full speed ahead for Milwaukee.
0237		340		Changed course as opposite.
0919		295		" " " "
0400	Calm	295		Clear, calm, visability good.
Thursday, Nov. 26				
0114		240		Changed course as opposite.
0300	W2	205		" " " " Sky partly cloudy, calm, visability good.

*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
1405				Half speed ahead, near Milwaukee harbor.
1425				Entering the harbor.
1430				Giving lines to two tug boats.
1520				Mooring pier #3. Let go tug boats, draft fwd. 8'0", aft 19'6", fuel 300/36. From Port Huron lightship to Milwaukee DIS. 440 miles in 28 hours 45 mins., A.S. 15.30.
1530				Port authorities boarded the vessel.
Friday, Nov. 27 0700				Five gangs on board, commenced loading in hatches #s 1, 2, 3, 5 and 6.
1115				Suspended loading on account of rain.
1245				Resumed loading.
1510				Suspended loading because of rain. Preparation for sailing, rainy weather, wind S30 to 35 miles. Loaded 649 tons of dry milk. Returned from the doctor 1. Psarras, Eleftherios A.B.; 2. Bakal- lelis, Icannis, A.B.; 3. Stamatis George, A.B.; 4. Zafiroopoulos, Antonios, A.B.; 5. Proakis, Vasilios A.B.; 6. Kallergis, Michele, Asst Steward.
1700				Engine ready, draft fwd. 9'6", aft 19'3" fuel 290/35.
1720				Moving away from the pier.
1735	ESE5/6	088		Leaving harbor, changed course as opposite, full speed ahead.
1745	ESE5/6	132		Changed course as opposite.
1802		149		Changed course as opposite.
2330				Slow near Calumet River.

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*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
Saturday, Nov. 28 018				Anchored outside Calumet Harbor waiting weather improvement. W to NW gale winds with heavy rains 45 to 50 miles. From Milwaukee to Chicago 80 miles in 5 hours 55 mins. A.S. 13.56.
Saturday, Nov. 28 430				We contacted by radio telephone the tug office, which informed us that entering the river was dangerous due to the currents from the falling rain and wind.
530				Weather improved somehow but we were informed by the same office that one of the bridges was damaged and also that we have to wait for another ship to clear the river which is blocked by the damaged bridge.
900				We advised by the tug boat office to proceed towards the entrance of the river.
910				Heaving up anchor, proceeding towards the entrance.
930				Two tug boats alongside, proceeding to Calumet River with various maneuvers.
300				Moored at loading pier, 5 gangs boarded the vessel (in spite of the fact that 7 gangs ordered) in hatches #s 2F, 2A, 3, 4 and 5.
310				Vessel secured, tug boats departed.
800				Work stopped because the longshoremen refused to work after supper because of the cold weather 14°F.
Sunday, Nov. 29 800				Resumed loading with 5 gangs (ordered 7 gangs) in #s 2F, 2A, 3, 4 and 5.
200 to 1300				Suspended work for meal.
410				Two additional gangs resumed in #s 1 and 3F.

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## EXTRACT FROM LOG BOOK      SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
1800				Work suspended for the day. The long-shoremen refused to work due to cold weather 10°F.
Monday, Nov. 30				
0900				Resumed loading with 5 gangs in #s 1, 2, 3, 4 and 5.
1200				Suspended work for meal.
1300				Resumed work on the same hatches.
1535				Finished #1.
1540				Finished #5.
1635				Finished #3.
1650				Finished #s 2 and 4. Total loaded tons general cargo.
Monday, Nov. 30				
1730				Edging, ready for shifting.
1815				Two tug boats alongside, moving slowly away from berth, proceeding down Calumet River.
2110				Let go tug boats.
2123				Leaving Calumet River.
2240				Anchored outside Chicago harbor waiting for tug boats. From Calumet to Chicago 16 miles in 4 hours 25 mins.
Tuesday, Dec. 1				
0155				Heaving up anchor, entering the harbor.
0215				Two tug boats alongside.
0250				Finished securing vessel alongside, let go tug boats and F. W. E.
0800				Four gangs boarded (6 gangs ordered) in #s 1, 2, 3, and 5.
1200				Loading suspended.
1300				Resumed loading with 5 gangs.

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*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
445				Suspended due snow falling. Long-shoremen left. Received 50 tons fuel and 105 tons water.
845				Engine ready.
900				Moving slowly away from the pier. Loaded total in Calumet and Chicago 1589.4 tons general cargo, draft fwd. 14'0", aft 20'5", fuel 283 diesel 29.
908				Left the breakwater.
920				Full ahead for Milwaukee.
Wednesday, Dec. 2				
015				Slow, near Milwaukee harbor.
045				Finished mooring, tug boat left, F.W.E. From Chicago to Milwaukee DIS. 75 miles in 4 hours 55 mins. A. S. 15.3.
000				Seven gangs boarded the vessel and working 2 gangs in 2F, 2 gangs in 3F, 1 gang in 4 and 2 gangs in 5.
Wednesday, Dec. 2				
025				Suspended work in #2 hold because of winch trouble.
000				Suspended work for lunch.
000				Resumed loading with the same number of gangs in the same hatches.
000				Stopped working for supper.
000				Resumed loading with the same number of gangs at the same hatches.
000				Port winch of #2F repaired, resumed loading in hatch #2F.
000				Loading suspended.
Thursday, Dec. 3				
000				Resumed loading with 7 gangs, two in #2, two in #3, two in #5 and 1 in #6.

*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
0930				Suspended in #5F starboard due winch trouble.
0945				Resumed #5F, winch was repaired.
1200				Suspended for lunch.
1300				Resumed at the same hatches.
1615				Suspended in #s 3, 5 and 6.
1630				Suspended in #2 and whole loading operation was terminated. Loaded total After doctor's findings, the A. B. Psarras, Eleftherios was signed off for further treatment, suffering from VD disease.
1700				Ready for sailing, waiting for tug boat
1745				Tug boat fast forward.
1800				Moving away from the pier, draft fwd 19'3" aft 24'4", fuel 255/26.
1830				Tug boat left.
1840				Leaving harbor.
1850				Full speed ahead for Welland Canal.
2400	ENES	025		Cloudy, rough sea, visibility good, temperature 10°F.
Friday, Dec. 4				
0800	ENE5/6	025		Weather as above.
0850		061		Changed course as opposite.
1055		098		Changed course as opposite.
1335		123		Passed Mackinac Bridge. Course as opposite.
1925		158		Changed course as opposite.
Saturday, Dec. 5				
0227		179		Changed course as opposite.

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*Exhibit D Attached to Stipulation of Facts*

EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
605				Half speed ahead for Port Huron lightship. From Milwaukee to Port Huron lightship DIS. 440 miles in 35 hours 15 min. A. S. 12.50.
650				Changed pilots. Proceeding to Detroit River.
833		094		Left Detroit River. Full speed ahead. From Port Huron light vessel to Detroit Channel DIS. 79 miles in 6 hours 43 mins.
unday, Dec. 6				
815				Slow, near Port Colborne.
818				Anchored waiting to enter Welland Canal. From Detroit to Port Colborne DIS. 186 miles in 13 hours 22 mins. A. S. 13.50.
840				Heaving up anchor, proceeding to take bunkers.
820				Moored at bunkering place.
830				Ready to go, received 120 tons fuel.
800				Moving away from the pier.
820				Moored outside #8 lock.
850				Let go lines to enter #8 lock.
800				Entering #8 lock.
825				Leaving #8 lock.
800				Entering #7 lock. I neglected to mention that at 10 a.m. I was informed by the Welland Radio that the Seaway closed yesterday, Dec. 5th at 2400.
815				Leaving #7 lock.
830				Entering #6 lock. Changed pilots.
853				Leaving #6 lock and entering #5 lock.

*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
Sunday, Dec. 6				
1620				Leaving #5 lock and entering #4 lock.
1650				Leaving #4 lock.
1718				Entering #3 lock.
1740				Leaving #3 lock.
1945				Entering #2 lock.
2000				Leaving #2 lock.
2035				Entering #1 lock. Changed pilots.
2050				Leaving #1 lock.
2110				Leaving the breakwater of Port Weller.
	048			Full speed ahead, course as opposite.
2155	073			Changed course as opposite. Through Welland Canal DIS. 22.5 miles in 1 hour 10 mins.
Monday, Dec. 7				
0700				Slow, near by Cape Vincent.
0715				Changed pilots, proceeding to Montreal. Port Weller to Cape Vincent DIS. 137.5 miles in 9 hours 50 mins., A. S. 14.03.
0820				Anchor due fog.
0945				Heaving up anchor, visibility improved.
1347				We anchor at Prescott waiting to enter the locks. From Cape Vincent to Prescott DIS. 51 miles in 6 hours 32 mins.
Tuesday, Dec. 8				
1200				Anchorage Prescott waiting.
Wednesday, Dec. 9				
1200				Waiting at Prescott.

BEST COPY

from the original

*Exhibit D Attached to Stipulation of Facts*

## EXTRACT FROM LOG BOOK      SS ORIENT MERCHANT—(Continued)

<u>Date/Time</u>	<u>Wind</u>	<u>Course</u>	<u>Distance</u>	<u>Remarks</u>
700				Received instructions from our company's N. Y. office to proceed to Toronto because the Seaway closed for the season due to the ice condition.
Thursday, Dec. 10 830				Heaving up anchor, proceeding to Toronto.
245				Slow, Toronto.
VISAED at Toronto, December 15, 1964 Vice Consul G. Politis				Master, SS ORIENT MERCHANT S. Orfanos

**Exhibit E Attached to Stipulation of Facts**

s. s. M/S OLAU GORM

Toronto, dec. 11' 1964

OWNER:

J. LAURITZEN

COPENHAGEN

Extract of the ships  
logbook.

Montreal, november 8', 1964. Arrived and moored Alexander pier at hour 06.20.

Montreal monday nov. 9'. *No work because of longshoreman's strike.*

Montreal tuesday nov. 10. Discharged with 3 gangs until 18.30 and sailed at 19.45—At hour 22.20 moored in St. Lambert Lock.

St. Lawrence Seaway wednesday nov. 11'. 15.07 left Iroquois Lock, 19.45 anchored because of fog, 21.30 proceeded.

Toronto, nov. 12'. Arrived at 13.05 and started discharging with four gangs. 22.00 work stopped for the day.

Toronto, friday nov. 13'. Discharged with four gangs from 08.00.

*Stop for rain, 16.05-16.15, 18.00-18.15, 18.40-19.00.*  
2240 finished discharging and sailed 23.05.

Port Weller road saturday, nov 14. Anchored at 02.05 hour, waiting for passage through Welland Canal.

Sunday 15 nov. at hour 14.37 moored in Lock nr. 1.

Monday 16 nov. at " 04.50 sailed from Lock nr. 8. Arrived at Ashtabula 12.55, discharging commenced at 14.00. Stop for rain 16.05-16.40. Stopped for the day at 20.00.



*Exhibit E Attached to Stipulation of Facts*

Ashtabula tuesday 17' nov. Discharged with 5 gangs. Winchstop nr 1, 14.05-14.15. Finished discharging at hour 22.00 and sailed 22.40.

Toledo, wednesday 18'. Arrived at 09.25 and sailed 22.20.

Detroit road. Anchored 19' nov. at 03.10. Berth not ready. Occupied by another ship, which were delayed due to snow and sleet.

Moored at Detroit Terminal pier at 19:15. Snow and sleet. Commenced discharging 08.00 with 2 gang, 09.00 one gang more. Discharged to 24.00 with one gang, and to 02.30 with same gang.

Saturday 21' at 08.00 discharged with 2 gang and from 15.20 one gang only. Winchstop #5 from 14.35-15.00.

Discharging ended at hour 19.30, and sailed from Detroit 19.40.

Sunday 22' nov. Encountered strong wind in Mackinaw strait, force 7 from westerlay directions. 20.00 hour wind WSW 7-6. 24.00 hour Wind and sea 6 - 6.

Monday 23' nov. anchored at Milwaukee road 14.10. Weighed anchor at hour 15.30.

Milwaukee, nov 23'. Arrived and moored at pier 3, hour 15.45. No work. Three gang ordered for discharging and two for loading.

Tuesday 24' nov. 07.00 one gang and one gang more from 16.00. Work stopped at hour 22.00.

Wednesday 25' nov. 07.00 five gang, winchstop #5 from 07.40-08.15 08.35-09.10, 11.50-12.00, 13.55-14.05, 15.30-

*Exhibit E Attached to Stipulation of Facts*

16.10 and from 16.15 to 16.35.——Loading finished at 17.30. Sailed at 19.05. Waited an hour for a ship to clear out of the bassin.

Chicago 26' nov. Arrived Calumet Harbor 05.30. Work commenced 08.30 with one gang. One gang more from 09.00 with two winchmen from the crew. Worked until 22.00.

Chicago friday 27' nov. 08.00 2 gang. Stop for rain 09.25-09.40, 09.50-10.15, 13.00-13.20, and work stopped for the day because of rain at hour 19.15.

One whole gang from the ships crew worked from 13.00 to 19.15 hour.

Chicago saturday 28' nov. 08.00 loaded and discharged with 5 gangs. Winchstop #5 09.15-09.35, 13.25-13.35 and #3 15.30-16.25, 17.25-17.35. Work stopped at hour 19.00.

Sunday 29' nov. Worked with 4 gangs from 08.00. At 16.30 work stopped in hatch 3. About 10 tons Chicago cargo carried on to Green Bay for discharging there.——Sailed from Chicago at 17.50.

Monday 30' november. 04.00 Wind north 6. 08.00 wind north, force 6. Passed through Sturgeon channel. Arrived Green Bay 17.45. Started loading with 5 gangs at 20.00 and stopped at 24.00.

Tuesday december 1'. Loaded with 5 gangs from 08.00 to 17.20. Work ended. Winchstop #2 16.25-16.43. Sailed for Buffalo 17.55.

December 2'. anchored at 22.55 off Port Huron L/V. Heavy snowfall.

*Exhibit E Attached to Stipulation of Facts*

December 3'. Anchor aweigh 02.50, proceeded.

December 4'. Arrived at Buffalo 03.40. No loading before 10.10 because of icy rain. Loaded with 6 gangs. 11.50 stop for rain. Work stopped at 18.30 because of icy rain. Winchstop #2 15.30-15.40, #3 16.35-16.45.

December 5'. Saturday. Loaded with 6 gangs from 08.00 to 22.30. Ship then loaded. Winchstop #2 14.20-14.36, #2 18.10-18.25. Sailed from Buffalo 23.55.

Buffalo december 5'-1964. Sailed at hour 23.55. Arrived at Welland Canal lock 8, dec. 6' at 0320. The lockmaster informed the ship, that St. Lawrence Seaway was closed for downbound traffic as from 18.00 hour, december 5th. This message repeated when passing the other lock's in the canal.

Arrived at lock nr. 1 at 10.45. The master was requested to call Welland Radio. Was again adviced that the Seaway was closed. Left lock 1 at 10.56 and proceeded for slow engine while waiting for radiocontact with our agent or with the Charterer.

At 1330 dec. 6' was informed from Hurum Shipping in Montreal, that the ship should proceed to the Seaway despite the announcement regarding the closing of the Seaway.

Seaway pilot was ordered to be ready at cap Vincent for sunday at 2400. About hour 16.00 Cornwall pilot office informed "Olau Gorm", that traffic downbound from cap Vincent was allowed only in daylight, as some of the buoys in the Seaway had already been withdrawn.

Anchored december 7' at 0015 off cap Vincent. Heavy fog. Weighed anchor again at 0715. Changed pilot at 0730. At anchor because of fog from 0850 to 0945.

*Exhibit E Attached to Stipulation of Facts*

Was informed from Iroquois Lock, that no downbound ships was allowed to proceed to the lock, as the seaway was closed from december the 5th- 1800 hour. Was advised to anchor at Prescott bay.

December 7' at 1310 anchored in Prescott bay. Await orders.

On december the 9th received orders, via "Orient Merchant", to go back to Toronto for winterberth. Weighed anchor on december 10th at 0840 and left Prescott bay.

Arrived and anchored in Toronto harbour december 11th at 0010 hour. Moored alongside "Orient Merchant" at 11.10 assisted by two tugs.

R. AARENSTRUP  
R. Aarenstrup,  
Master

**Exhibit F Attached to Stipulation of Facts**

EAGLOTRANS

WU CPL NY GA

TWX121

RAA151 CORNWALL ONT 25 1129A

ORIENT MID EAST LINE 29 BROADWAY  
NEW YORK NY

IN THE BEST INTERESTS OF ALL CONCERNED  
WE RESPECTFULLY REQUEST ETA OF  
OCEAN VESSELS FOR SEAWAY TRANSIT  
RE APPROACHING CLOSING OF THE 1964  
NAVIGATION SEASON 1 ETA UPBOUND ST  
LAMBERT LOCK ONE 2 ETA  
DOWNBOUND PORT COLBORNE LOCK  
EIGHT 3 ETA DOWNBOUND IROQUIS LOCK  
SEVEN

D MACKENZIE ST LAWRENCE SEAWAY  
AUTHORITY

COL 1964 1 ETA 2 ETA 3 ETA

GVN 145 P

**Exhibit G Attached to Stipulation of Facts**

WU CBL NY GA  
EAGLOTRANS  
NOV. 25 1730

D. MACKENZIE  
ST. LAWRENCE SEAWAY AUTHORITY  
CORNWALL ONTARIO

YOURS TODAY ETAS 1 NONE 2 OLAUGORM  
SEVENTH ORIENT MERCHANT SIXTH EXXX  
3 OLAUGORM EIGHTH ORIENTMERCHANT  
SEVENTH RESPECTFULLY REQUEST  
IMMEDIATE ADVICES EVENT AUTHORITIES  
DECIDE CLOSE SEQXX SEAWAY SOONER  
IN ORDER ATTEMPT ALTER ARRANGEMENTS  
OREMEAST

PLS SEND LT PLS AND ACKN GAS  
RECD OX 430P  
TK

**Exhibit H Attached to Stipulation of Facts**

WU CBL NY GA  
SENT DEC 9, 1964  
CHARGE ACCT B

WDX  
EAGLOTRANS

WDX  
ML  
CHURCH WORLD SERVICES  
CARE OF INTERNATIONAL EXPEDITERS INC  
345 HUDSON STREET  
NEW YORK NY

THIS IS TO ADVISE YOU THAT BECAUSE OF  
FORCE MAJEURE THE ORIENTMERCHANT  
AND OLAUGORM ARE UNABLE TO  
LEAVE THE XXX LAKES AS A CONSEQUENCE  
OF THE CLOSURE OF THE STLAWRENCE  
SEAWAY, THE VOYAGE HAS THUS BEEN  
TERMINATED AND THE FREIGHT EARNED. IN  
ACCORDANCE WITH YOUR REQUEST WE  
WILL LEAVE THE CARGO ON BOARD  
THE VESSELS DURING THE WINTER MONTHS.  
WE SHALL BE GLAD TO DISCUSS WITH YOU  
THE ADJUSTMENT OF A NEW FREIGHT TO  
APPLY FOR THE NEW VOYAGE.

EAGLE OCEAN TRANSPORT INC  
AS AGENTS FOR  
ORIENT MID EAST LINES

**Exhibit I Attached to Stipulation of Facts**

THIS AGREEMENT made as of this 3rd day of March, 1965, between Eagle Ocean Transport, Inc., as agents for Orient Mid-East Lines, Inc. (hereinafter referred to as the "Carrier"), and CARE, Seventh Day Adventists, Church World Services, and Lutheran World Relief (hereinafter collectively referred to as the "Shippers") and Commodity Credit Corporation, a corporate agency of the United States of America (hereinafter sometimes referred to as the "Government"):

**WITNESSETH:**

WHEREAS, the Carrier presently has two vessels, the OLAU GORM and the ORIENT MERCHANT, locked into the Great Lakes until the St. Lawrence Seaway opens for navigation in the Spring of 1965, and the Shippers have cargo on board these two vessels which had been donated to Shippers by Commodity Credit Corporation for the assistance of needy persons outside the United States under Section 416 of the Agricultural Act of 1949, as amended, and was loaded at various Great Lakes ports during November and December of 1964 (hereinafter referred to as "Shippers' Cargo"); and,

WHEREAS, the Shippers in January 1965, assigned and transferred to Commodity Credit Corporation all their right, title and interest in Shippers' Cargo and all rights and claims they have against Carrier with respect to such cargo, and Shippers have retained all their obligations to Carrier under the bills of lading issued for such cargo; and Shippers are entitled to claim reimbursement for ocean freight charges for such cargo from the Agency for inter-



*Exhibit I Attached to Stipulation of Facts*

national Development pursuant to AID Regulation No. 2;  
and,

WHEREAS, the Carrier claims it has a right to discharge the Shippers' Cargo at a convenient Great Lakes port or elsewhere and collect and retain full freight as set forth in the bills of lading originally issued to the Shippers, and also to charge Shippers a second full freight for carriage of Shippers' Cargo from the Great Lakes to the destinations described in the bills of lading originally issued, and also to charge the Shippers reasonable extra compensation for services rendered to the Shippers' Cargo; and at Shippers' request Carrier has not discharged Shippers' Cargo but retained it on board the vessels; and,

WHEREAS, the Shippers and the Government claim that the Carrier is under an obligation to deliver Shippers' Cargo to destination set forth in the bills of lading originally issued for the Shippers' Cargo without payment of a second freight and without additional compensation for services rendered to Shippers' Cargo; and,

WHEREAS, the Shippers and the Government desire that the Shippers' Cargo be transported upon opening of the St. Lawrence Seaway to the destinations named in the bills of lading and wish to avoid the hardships and inconvenience which might result if the Carrier exercised its asserted full rights, including the right of discharge which it claims is provided for in the bills of lading; and,

WHEREAS, the Shippers and the Government on the one hand and the Carrier on the other hand desire to enter into this undertaking in order to provide for the performance

*Exhibit I Attached to Stipulation of Facts*

of their obligations herein stipulated without prejudice to the rights of any parties;

NOW, THEREFORE, in consideration of the terms, mutual promises, covenants and undertakings herein, the parties agree as follows:

1. Promptly upon execution of this agreement the Shippers shall surrender the bills of lading originally issued and the Carrier shall issue new clean bills of lading providing for transportation of the Shippers' Cargo under the terms and conditions of the Carrier's standard form bill of lading (hereinafter referred to as the "second bills of lading") to the same destinations as those named in the original bills of lading except that the destination of the Cargo of non-fat drymilk shipped by Church World Services on the OLAU GORM to Gdynia, Poland, will be changed to Piraeus, Greece the Carrier's intended port of discharge, because of the limitations in Section 203 of the Agricultural Trade Development and Assistance Act of 1954, as amended, upon the payment of freight charges from Government funds. Simultaneously Shippers shall pay full freight to the Carrier under bills of lading first issued unless such freight has already been paid, except that the freight to be paid under the original bills of lading to Gdynia, Poland, on the cargo changed to Piraeus, Greece, will be the freight charges to Piraeus, Greece. The Carrier agrees that the OLAU GORM and ORIENT MERCHANT shall perform voyages in accordance with the terms of the second bills of lading issued to the Shippers when the St. Lawrence Seaway opens for navigation in the Spring of 1965 without payment of any amount in addition to the freight paid under the first bills of lading unless the parties mutually agree on an additional

*Exhibit I Attached to Stipulation of Facts*

amount or it is determined by a United States court of competent jurisdiction as provided in paragraph 2 hereof that the carrier is entitled to an additional amount.

2. If the Shippers and/or the Government cannot reach an agreement with the Carrier on the amounts, if any, due the Carrier in addition to the freight already paid under paragraph 1 of this agreement, any party may institute suit in a United States Court of competent jurisdiction for the resolution of such issue, all parties retaining all rights and defenses they presently have, and this agreement, issuance of the second bills of lading, and the payment provided for in article 1 above shall not be deemed to affect, waive or alter the rights or defenses of any party. Also in view of the provisions of this agreement relating to carriage under the second bills of lading, the failure of the Carrier physically to exercise any of its claimed rights, including the asserted right to discharge at Great Lakes ports or elsewhere, shall not be deemed to affect or diminish the amounts and/or rights of the Carrier to any further freight and/or remuneration to which the Carrier may be entitled under the contracts of carriage as evidenced by the second bills of lading and/or the bills of lading first issued.

3. Carrier agrees that while the OLAU GORM and ORIENT MERCHANT remain in the Great Lakes prior to transiting the St. Lawrence Seaway in the Spring of 1965, the Carrier shall permit representatives of the Government to board these vessels, at reasonable times and with reasonable notice, to inspect the condition of the Shippers' Cargo.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date first above written.

*Exhibit I Attached to Stipulation of Facts*

EAGLE OCEAN TRANSPORT, INC.,  
as Agents for  
ORIENT MID-EAST LINES, INC.

CARE

By Illegible

By IRVING B. SILBERFORD

Attest:

J. HOVELL  
(CORPORATE SEAL)

SEVENTH DAY ADVENTISTS

By W. E. PHILLIPS

CHURCH WORLD SERVICES

By WILSON D. RADWAY

LUTHERAN WORLD RELIEF

By Illegible

COMMODITY CREDIT CORPORATION

By ROLAND E. BALLOU  
Acting Vice President

**Exhibit J Attached to Stipulation of Facts**

**UNITED STATES GOVERNMENT  
MEMORANDUM**

**U. S. DEPARTMENT OF COMMERCE**  
Maritime Administration  
Washington, D. C.

Dated: March 9, 1965

In reply refer to:

QM8/L25-3:630

**TO : Secretary, Maritime Subsidy Board**  
**FROM : Chief, Office of Government Aid**  
**SUBJECT: AMERICAN EXPORT ISBRANDTSEN LINES, INC.**  
**—Lay-up of the SS FLYING INDEPENDENT in**  
**excess of 30 days**

The attached memorandum reports on the lay-up of the SS FLYING INDEPENDENT in the Great Lakes from January 11, 1965 until opening of the 1965 Great Lakes navigation season (April 1965) when a new voyage can be commenced. The SS FLYING INDEPENDENT was not permitted to proceed through the Iroquois Lock on December 7, 1964 and Voyage No. 16 was terminated on January 10, 1965 after the ship returned to Toledo, Ohio, discharged all cargo and prepared for winter lay-up.

A review of the operations of the SS FLYING INDEPENDENT indicates that the lay-up can be attributed to conditions beyond the control of the operator. The operation of the SS FLYING INDEPENDENT, one of the two ships assigned to the applicant's Trade Route No. 32 (Line G)—Great Lakes/Western Europe Service, will be again required in early April to meet the sailing requirements on this service,

*Exhibit J Attached to Stipulation of Facts*

and it is recommended that the ship remain in subsidized status during the lay-up.

EDWARD APTAKER  
Edward Aptaker

RECOMMENDATION:

It is recommended that the Maritime Subsidy Board:

1. Determined that the SS FLYING INDEPENDENT is essential to the maintenance of adequate service on American Export Isbrandtsen Lines' subsidized Great Lakes/Europe Service, and
2. Approved the retention of the SS FLYING INDEPENDENT in subsidized status.

Approved by the  
Maritime Subsidy Board  
Maritime Administration  
Date Mar 24 1965  
(Illegible)  
Secretary



## Exhibit K Attached to Stipulation of Facts

AMERICAN EXPORT ISLANDERS LINES, INC.  
 SS FIVE INDEPENDENT VOY. 15 & 16

	Arrival		Passage			Aver. Speed		Passage Delays	Departure		Port Time			Tons Cargo Disch.	Tons Cargo Loaded	Port Delays & Remarks
	Date	Time	D	H	M				Date	Time	D	H	M			
Le Havre	11/3	1412	1	15	42	14.04	None		11/4	2230	1	03	18		301	None
Montreal	11/17	1300	12	20	30	11.52	Reduced speed 7 days, bad weather. Passage 1 1/2 days extra time.		11/18	2030	1	07	30	974	-	5 gangs knocked off 1 hour early due to heavy snow 11/17.
Toronto	11/20	2242	2	02	12	5.89	Anchored due fog 6 H-32 H-tied up waiting lock transit 1 H.-32 H. Total delay 8 H-6 H		11/22	2200	1	23	18	1,145	-	4 gangs 3 hours each due to congestion at berth. Unable to shift ship to alternate berth C 11/21-1700 due to high winds.
Toledo	11/25	0812	2	05	42	4.84	Delay awaiting transit Welland Canal 20 H-54 H.		11/27	0105	1	21	24	894	418	None
Detroit	11/27	0913	0	08	12	5.73	Anchored awaiting berth-1 H 37 H		11/28	2130	1	20	24	1,121	432	3 gangs delayed discharging pig iron due terminal difficulties, 65 tons cargo overcarried.
Chicago	11/30	1150	1	18	00	14.21	None		12/1	1654	1	02	24	1,303	1	6 gangs knocked off @ 1400-12/1, refusing to work due to cold, wind & snow; 808 tons cargo overcarried.
Kenosha	12/2	0151	0	15	00	8.07	Anchored awaiting daylight to dock - 9 H-18 H		12/4	0642	1	22	48	259	225	5 gangs refused to work 12/3 from 1300-1515 due to snow; 1500/2200 resumed. Gangs worked from 0800-12/3 to 0630-12/4 to complete operations. 549 tons cargo overcarried.
Ogdensburg	12/7	1325	1	14	53	10.2	None		12/10	0812	2	13	37			Vessel proceeded directly from Kenosha to an anchorage 4 miles upstream from Ogdensburg. Anchored awaiting permission to proceed to Iroquois Lock for transit through St. Lawrence Seaway.
Toledo	12/12	1643	0	02	35	7.7	Anchored due to fog-14 H-28 H							1,624	-	All overcarried cargo Voy.15 & all outward cargo Voy.16 disch.-finished 2 1610-12/18.



**Exhibit L Attached to Stipulation of Facts**

OP:SEM

December 15, 1964

Food for Peace Division

A I D

State Department

Washington, D. C.

Attention: Mr. Paul Johnson

Gentlemen:

s/s OLAU GORM / s/s ORIENT MERCHANT

We refer to our recent telephone conversation with your Mr. Johnson with regard to cargoes of voluntary relief agencies now on board the captioned ships.

As you are aware, the relief agencies have requested us to retain the cargo on board during the winter months. For the protection of the cargo, we are instructing the Master of each vessel to see to it that the cargo is ventilated at regular intervals, weather permitting. The Line will do whatever is reasonable and necessary to assure the preservation of the cargo.

Very truly yours,

EAGLE OCEAN TRANSPORT, INC.,  
As Agents

O. Pendias, General Manager

c/c to: Piraeus and London

C. A. R. E.

Church World Service

Seventh Day Adventists

Lutheran World Relief Council

**Exhibit M Attached to Stipulation of Facts**

OP:SEM

December 13, 1964

Captain S. Orfanos  
SS ORIENT MERCHANT  
c/o Toronto

Dear Captain Orfanos:

We request you to please have your crew ventilate regularly the holds of your vessel, weather permitting.

We suggest that the air vents be trimmed and, if necessary, hatches should be opened up on occasion to permit the best possible ventilation to the cargo.

We repeat to you that such ventilation should be done only when weather permits.

Very truly yours,

EAGLE OCEAN TRANSPORT, INC.,  
As Agents

O. Pendas General Manager

c/c to: Piraeus  
London

**Exhibit N Attached to Stipulation of Facts**

UNITED STATES GOVERNMENT

*MEMORANDUM*

U. S. DEPARTMENT OF AGRICULTURE  
Agricultural Stabilization and Conservation Service

February 18, 1965  
S/S Orient Merchant  
M/V Olau Gorm

TO: Mr. W. A. McCannon, Chief Storage Management Division  
FROM: Henry Reich, Warehouse Examiner  
SUBJECT: Special—Cargo in Vessels berthed in Port of Toronto,  
Canada.

On February 16th and 17th a commodity condition inspection of cargo in above 2 vessels was conducted by this Examiner and Mr. Lionel Berger of the Buffalo, New York Grain Office and Mr. Eric Linde of the Chicago, Illinois C&MS office.

Temperatures, humidities and other details are listed on attached.

The vessels are alongside each other in the Turning Basin, also known as Pier 50 on Commissioner Road. The larger ship, the S/S Orient Merchant, is landside and is connected with the M/V Olau Gorm via a bridge walk. No terminals or other buildings are in the general vicinity of the 2 and about 8 other ships berthed in the Basin area, awaiting opening of the Seaway.

A total of 6 Holds of the S/S Orient Merchant are stocked with Bulgur Wheat, Rolled Wheat, Cornmeal and powdered milk. All holds were accessible. Our thorough checking of visible units of all products, up to 30% in some holds, disclosed no signs of any degree of dampness, mold formations, infestation or caked up portions. Nor was any evidence of moisture, any type infestation or of other undesirable con-

*Exhibit N Attached to Stipulation of Facts*

dition found in the few open spaces of holds or at hull areas able to check. Several containers from each commodity were turned but no damaging conditions were found. Samples of the grain products were taken by Mr. Berger. A number of milk bags and some packaged milk units were opened and no lumps or other type exceptions were in evidence. The handling damage in visible units totaled 11 torn milk bags and 15 torn cornmeal bags. Forced air circulation through ducts in each hold is maintained during daylight hours, also weather permitting, parts of hatches are opened daily for additional airing.

The M/V Olau Gorm has 5 holds stocked with Bread, Flour, All Purpose Flour, Dried Milk and Navy Beans. Only number 2 hold was accessible through escape hatch. Hatches of other holds could not be opened as no rigging crew is on board and the escape hatches are blocked to top with the bagged merchandise. All conditions in Hold 2 were found quite satisfactory. None of the visible units had lumpy contents or showed signs of moisture, mold or any type in festation. Only 1 torn bag of bread flour was visible. Forced air circulation is maintained in all holds. Mr. Berger took samples of the grain stocks. In full agreement with Messrs. Berger and Linde the present condition of visible cargo and accessible holds could not justify our recommendation to unload the merchandise for storing.

HENRY REICH

*Exhibit N Attached to Stipulation of Facts*

UNITED STATES GOVERNMENT

## MEMORANDUM

U. S. DEPARTMENT OF AGRICULTURE  
Agricultural Stabilization and Conservation Service

TO :

Page#2

FROM :

SUBJECT: S/S Orient Merchant—Cargo check February 16, 1965  
Captain Stamatis Orfanos  
Usual crew 40 men, present crew for maintenance 20 men.

		Outside Temp.	Hum.	Inside Temp.	Hum.	Product Temperature		
						Milk	Cornmeal	Wheat
2/16	9:00 a. m. Hold	30°	65%					
#1	upper tween			34°	61%	31°	31°	—
#1	lower tween			35°	60%	32°	32°	—
#2	upper tween			34°	60%	33°	30°	—
#3	upper tween			30°	58%	30°	30°	—
#3	lower tween			32°	60%	31°	—	31°
#3	lower hold			32°	60%	30°	—	30°
#4	upper tween			43°	61%	35°	—	—
#4	lower tween			42°	62%	37°	—	—
#5	upper tween			35°	62%	—	32°	—
#5	lower tween			35°	62%	33°	—	32°
#6	lower tween			33°	60%	31°	—	—
#6	lower hold			33°	60%	29°	—	—
2/16	4:00 p.m.	26°	60%					

Higher temperatures in Hold 4 apparently due to adjacent location of engine room.

*Exhibit N Attached to Stipulation of Facts*

UNITED STATES GOVERNMENT

MEMORANDUM

U. S. DEPARTMENT OF AGRICULTURE  
Agricultural Stabilization and Conservation Service

To :

Page # 3

FROM :

SUBJECT: M/M Olau Gorm—Cargo check February 17, 1965

Captain Hans R. Aarenstrup

Usual crew 32 men, present crew for maintenance 7 men.

2/17 8:30 a.m. temperature 22°, humidity 60%

Hold 2 tween deck 30 degrees, humidity 56%. Milk 32 degrees, Flour 30 degrees.

No. 2 lower hold 29 degrees, humidity 56%. Both type flour 30 degrees.

2/17 11:00 a.m. outside temperature 31 degrees and humidity 63%.

Holds 1, 3, 4 and 5 not accessible for checking. No rigging crew on board to open hatches and the escape hatches are filled to top.

Per Weather Bureau, expected averages for the Toronto area are:

For March—Temperature 32.2 degrees, Humidity 70%

For April —Temperature 44.1 degrees, Humidity 65%

**Exhibit P Attached to Stipulation of Facts**

[Letterhead of]

**FRANK B. HALL & CO., INC.**

67 WALL STREET, NEW YORK 5, N. Y. • WHITEHALL 4-3300

July 13th, 1965

Claim No. 6739

s.s. "ORIENT MERCHANT"

Stranded,

April 27, 1965.

\* \* \*

Assured: Orient Mid East  
Lines, Inc.

\* \* \*

To: Cargo Shippers, Consignees and/or Underwriters

Dear Sirs:

The Steamer "ORIENT MERCHANT", having loaded a general cargo at Milwaukee, Wisconsin; Chicago, Illinois; and Duluth, Minnesota, sailed from Duluth on April 23rd, 1965, for Far East Ports.

While proceeding ahead with a Pilot on board to the entrance of Port Colborne on April 27, 1965, to start her passage through the Welland Canal, the vessel stranded on the East side of the channel off the entrance of Port Colborne. Soundings indicated that the vessel had stranded on a rocky and irregular bottom.

Efforts to refloat through the use of her engines were unsuccessful and Tug assistance was requested. The Tug "LAWRENCE C. TURNER" arrived alongside the vessel later this same evening and after further unsuccessful efforts to refloat with the assistance of the Tugboat, and with the use of her engine, it was decided that a quantity of cargo should be discharged from the vessel.

*Exhibit P Attached to Stipulation of Facts*

A Lighter arrived alongside the vessel on April 30th and when weather conditions permitted the discharge of cargo commenced.

After lightering approximately 653 tons of cargo, and further unsuccessful efforts to refloat the vessel with the assistance of the Tugboats, and by using her engines, the operation was suspended on May 3rd, 1965, and Lloyd's form of Salvage Agreement—"No Cure—No Pay", providing for payment of a lump sum of \$75,000.00, if successful, was entered into with McQueen Marine Ltd. The equipment of McQueen Marine Ltd. arrived alongside the vessel on May 6th and the vessel was refloated on May 8th.

Due to heavy pounding on the rocky bottom as a result of heavy weather while the vessel was stranded, she had commenced leaking heavily. Compressors were put on board the vessel to control the leakage and after an inspection by Owners, Classification and Underwriters' Surveyers, and the Seaway Authorities, permission was granted for transit of the Seaway to Port Weller for drydocking and examination.

After replenishing her bunkers at Port Colborne, the vessel commenced the transit of the Canal to Port Weller late in the evening of May 9th.

Early on the morning of May 10th an inspection of the vessel by the Seaway Authorities indicated that despite the working of the compressors which had been placed on board the vessel, the draft was increasing, indicating the vessel was still leaking. It was necessary, to comply with the Seaway Authorities' requirements regarding the maximum draft of the vessel, that a quantity of cargo be discharged and she was therefore moved to Thorold. After discharging 315 tons of cargo the transit of the Seaway continued on May 12th. The vessel arrived at Port Weller later this same day and was immediately drydocked.

After a survey of the vessel, estimates of repair costs were obtained and it was determined that the vessel was a Constructive Total Loss,



*Exhibit P Attached to Stipulation of Facts*

and the voyage was abandoned. Shippers were notified accordingly and the vessel was subsequently moved to Toronto, where all cargo remaining on board was discharged and delivered to the Shippers.

A General Average Cargo Surveyor had been in attendance during the discharge of cargo from the Lighter at Buffalo, and additional cargo discharged from the vessel at Thorold and at Toronto, and allowances for the damage sustained during the forced discharge will be considered in the Statement of General Average which is presently in the course of preparation.

The expenses which have been incurred in the efforts to refloat the vessel, discharging cargo at Buffalo and Thorold, drydocking for examination at Port Weller and subsequently the removal and discharge of cargo at Toronto are very substantial and the Vessel Owners have requested Cargo make a Payment on Account pending completion of the Adjustment of General Average to assist them in settling the unpaid accounts, or to partially reimburse them for accounts which they have already settled.

Interest and Advancing Commission will of course be credited against the Payment on Account in the final Adjustment.

We have been furnished with the following accounts:

*McAllister—Pyke Salvage Ltd.*

For services of Tugs, Barges and Salvage Master in efforts to refloat .....	Can. \$50,250.18	
	Exchanged @ \$.9306....	U.S. \$ 46,762.82

*The Great Lakes Towing Company*

For services of Tug "LAURENCE C. TURNER" in efforts to refloat .....		9,957.20
--	--	----------

*Atlas Equipment Rental, Inc.*

For rental of Truck Crane unloading cargo from Lighter "MAPLEHEATH" at Buffalo Port Terminal .....		1,350.36
--	--	----------

*Pittston Stevedoring Corp.*

For discharging cargo at Buffalo .....		7,592.77
--	--	----------

*Exhibit P Attached to Stipulation of Facts**McQueen Marine Limited*

For salvage assistance as agreed plus standby time of  
Salvage Tugs as ordered by Owners' Representatives  
Can. \$75,810.00

70,548.79

Exchanged @ \$.9306

Forward

\$136,211.94

Forward U.S.

\$136,211.94*Niagara District Warehouse & Forwarding Co., Ltd.*

For discharging cargo at Thorold .....Can. \$1,639.42

Exchanged @ \$.9306....

1,525.64

*E. G. Marsh Ltd.*

For hire of compressors, etc. ....Can. \$5,006.35

Exchanged @ \$.9306....

4,658.91

*Port Weller Dry Docks*

For drydocking and temporary repairs to enable the vessel to  
proceed to Toronto .....Can. \$47,966.30

Exchanged @ \$.9306....

44,637.44

*Canadian Dredge & Dock Co., Ltd.*

For towage of vessel from Port Weller to Toronto,  
etc. ....Can. \$6,445.00

Exchanged @ \$.9306....

5,997.72

*The Toronto Harbour Commission*

For labor supplied sorting and cooping damaged cargo  
Can. \$975.28

Exchanged @ \$.9306....

907.60

*Cullen Stevedoring Co., Ltd.*

For discharging cargo at Toronto.....Can. \$30,022.58

Exchanged @ \$.9306....

27,939.01

\$221,878.26

In addition to the accounts as indicated above, there will be additional expenses to be allowed in General Average for the attendance of Owners' Representatives, wages, provisions, overtime, fuel and engine stores consumed during efforts to refloat and prolongation of the voyage; Owners and Classification Surveyors' expenses; port charge at Port Colborne, Port Weller and Toronto; and miscellaneous expenses, all of which are estimated conservatively to be in excess of \$25,000.00.

*Exhibit P Attached to Stipulation of Facts*

The Adjusters feel that a Payment on Account of \$200,000.00 may safely be made at this time and is provisionally apportioned over estimated values, as follows:

		<u>Contributory Values</u>	<u>Payment on Account</u>
VESSEL:			
Valued in Damaged Condition		\$ 100,000.00	\$ 12,048.74
FREIGHT:			
None at Risk		—	—
CARGO:			
Delivered Values:			
United States Department of Agriculture		925,000.00	111,450.89
UNICEF		550,000.00	66,268.09
	<u>Commercial Cargo</u>		
Milwaukee/Inchon	B/L #1	6,258.00	754.01
Milwaukee/Manila	B/L #5	186.00	22.41
Milwaukee/Manila	B/L #6	4,500.00	542.19
Milwaukee/Manila	B/L #7	100.00	12.05
Chicago/Pusan	B/L #2	51,611.00	6,218.48
Chicago/Manila	B/L #5	1,500.00	180.73
Chicago/Inchon	B/L #3	11,969.00	1,442.11
Milwaukee/Keelung	B/L #1	3,200.00	385.56
Chicago/Manila	B/L #2	200.00	24.10
Chicago/Djakarta	B/L #1	3,000.00	361.46
Chicago/Djakarta	B/L #2	500.00	60.24
Chicago/Djakarta	B/L #3	700.00	84.34
Chicago/Djakarta	B/L #4	100.00	12.05
Chicago/Djakarta	B/L #5	200.00	24.10
Chicago/Djakarta	B/L #6	100.00	12.05
Chicago/Djakarta	B/L #7	300.00	36.15
Chicago/Djakarta	B/L #8	200.00	24.10
Chicago/Djakarta	B/L #9	200.00	24.10
Chicago/Djakarta	B/L #10	100.00	12.05
		<u>\$1,659,924.00</u>	<u>\$200,000.00</u>
		<u>(Or 12,048.74 per cent.)</u>	

109a

*Exhibit P Attached to Stipulation of Facts*

The Contributory Values of cargo will be adjusted as necessary in the Statement of General Average.

Very truly yours,

LIVINGSTONE  
Vice President

TLivingstone: ct

**Exhibit Q Attached to Stipulation of Facts**

WU CBL NY GA

EAGLOTRANS

29 BROADWAY SENT 5/3/65

NL

DEPARTMENT OF JUSTICE

ATTN MR LAWRENCE LEDEBUR

CHIEF ADMIRALTY AND SHIPPING SECTION

WASHINGTON DC

REFERENCE ORIENTMERCHANT VESSEL  
GROUNDED 1½ MILES WEST OF  
WELLANDCANAL OFF PORTCOLBORNE ABOUT  
0500 APRIL 27TH. EFFORTS TO REFLOAT  
VESSEL WITH TUGS AND SHIPS POWER  
UNSUCCESSFUL REQUIRING DISCHARGE OF  
SUBSTANTIAL AMOUNT OF CARGO.  
UNDERSTAND GOVERNMENT ASSUMING  
LIABILITY GENERAL AVERAGE FOR UNICEF  
CARE NCWC SEVENTHDAY ADVENTIST AND  
CWS THEREFORE SUGGEST GOVERNMENT  
SEND THEIR OWN INSPECTOR FOLLOW  
SALVAGE OPERATIONS OF CARGO

EAGLE OCEAN TRANSPORT INC AS AGENTS  
29 BROADWAY NYK

PL SACK

RD

RCVD 534P

**Exhibit R Attached to Stipulation of Facts**

COPY

May 25, 1965

Gentlemen:

As you doubtless already know, the ORIENT MERCHANT, on April 27, 1965, grounded in heavy fog outside Port Colborne. She could not be released either by her own efforts or with tug assistance. She was found to be leaking in her holds and double bottoms.

By the aid of a salving company, she was finally brought to a repair yard in Port Weller, in the Welland Canal. It then became evident that the costs of repairs to enable the vessel to continue her voyage to the Far East would much exceed her value when repaired. These repairs could not be undertaken until the cargo now on board was discharged, and discharge could not take place at Port Weller because of lack of facilities.

As soon as the ORIENT MERCHANT can be put in such condition that she can safely be brought to Toronto, she will be brought there and her cargo discharged and put at the disposition of the bill of lading holders, subject to liens for general average, etc.

In view of all of the above circumstances, Owners are forced to notify you that upon completion of the discharge at Toronto, the voyage will be abandoned.

112a

*Exhibit R Attached to Stipulation of Facts*

All rights to general average and under the bill of lading contract are reserved.

Very truly yours,  
EAGLE OCEAN TRANSPORT, INC.  
As Agents For  
ORIENT MID EAST LINES, INC.

Nicholas A. Lyras

NAL:S

CC: Piraeus

113a.

**Exhibit S Attached to Stipulation of Facts**

**[WESTERN UNION TELEGRAM]**

1965 JUN 2 AM 3 30

NNO36 (04)(56) SYC 004  
SY WAO17 GOVT NL PD FAX WASHINGTON DC 1  
NICHOLAS A LYRAS

ORIENT MID-EAST LINES INC  
29 BROADWAY NYK

RE S/S ORIENT MERCHANT STRANDED GREAT  
LAKES. COMMODITY CREDIT CORPORATION  
HAS NO OBJECTION YOU DISCHARGING CCC  
CARGO AT PORT OF TORONTO, CANADA.  
MR. HENRY REICH OF USDA WILL REPRESENT  
MINNEAPOLIS ASCS COMMODITY OFFICE IN  
THE HANDLING AND STORAGE OF THE  
COMMODITY

ROLAND F BALLOU DEPUTY ADMINISTRA-  
TOR COMMODITY OPERATIONS AGRICUL-  
TURAL STABILIZATION AND CONSERVATION  
SERVICE.



**Excerpts from Trial Testimony****[3] OPENING STATEMENT ON BEHALF OF PLAINTIFF**

Mr. Poor: Your Honor, I will now make an opening statement. I understand Your Honor has had a chance to, at least, glance through the stipulation of facts.

The stipulation of facts here contains many of the more important parts of the case. If we had not had that stipulation, this case would take a long time to try. I think we are down to just one or two issues of fact at the present time.

This is a suit by the Orient Mid-East Lines, which is an ocean ship owner and carrier. It is a consolidated [4] admiralty suit against four independent shippers. This suit is to recover freight, storage charges, interest, and other items under its contracts with the defendants.

After this suit was commenced, the United States intervened and we understand that whatever judgment the plaintiff obtains in this action will be paid by the United States.

These shipments were part of the U. S. give-away program, that is, as I understand the procedure, the United States donated milk and various other products to be taken over to various places in the—well, some in the Mediterranean. I think some of it was going to Poland by transshipment, and some of it was going out to the Far East to Indonesia and to Formosa and other parts in that general vicinity.

The stipulation, as I say, covers all of the background and facts and attached to the stipulation are Exhibits A to S which cover the documentary or most of the documentary part of the case.

The shipments were made from Chicago, Milwaukee, Buffalo and other ports of the Great Lakes. The background of the case centers upon the fact that the St. Lawrence Seaway System, which was opened for deep draft vessels in [5]

*Opening Statement on Behalf of Plaintiff*

1959, is closed during the winter months. Before 1964, the St. Lawrence Seaway always remained open long enough to permit all ocean-going vessels to get out of the Great Lakes and enter the ocean before the Seaway was closed.

In 1964, however, the Seaway closure which took place on December 5th at midnight, for the first time, trapped four ocean vessels in the Great Lakes for the winter. That meant a loss of time for those vessels of about four and a half months because the Seaway was not opened until late in April of 1965.

Two of these vessels were the plaintiff's ships: the Orient Merchant and the Olau Gorm. The Orient Merchant was owned by the plaintiff. The Olau Gorm was under time charter to the plaintiff and there is a slightly different situation as to the Olau Gorm in that that ship had cargo on board for the Mediterranean and the charter would have terminated as soon as the cargo was discharged, so that the Olau Gorm charter would have terminated in early January of 1965 if the ship had been permitted to pass through the Seaway.

Now, it is a well-known fact in maritime circles, of course, that there are certain ports which are icebound during the winter. There are such ports in the Baltic, in [6] the Black Sea and now that we have the Great Lakes, we have icebound ports in the Great Lakes. That means that during the winter, ships cannot get in and if they are in and they don't get out, they can't get out.

Now, in order to deal with that situation, it has been customary for many years to insert in shipping contracts the so-called "ice clause" and there was such a clause in the bills of lading which were issued to cover the cargo on the two ships that we are interested in, namely, the Olau Gorm

*Opening Statement on Behalf of Plaintiff*

and the Orient Merchant. This ice clause covered other things besides ice. It is rather broad in scope. It covers strikes. It also covers governmental detention of various kinds.

If Your Honor will permit me, I will read the clause which is quoted, I believe, in our stipulation of facts. The pertinent part of it reads:

"In case of . . . ice or closure by ice, or the happening of any other matter or event, . . . and whether taking place at or near the port of discharge or elsewhere in the course of the voyage and whether or not existing or anticipated before commencement of the voyage, which . . . in the judgment of the Master or carrier may . . . give rise to delay or difficulty in [7] reaching, . . . the port of discharge, the carrier or Master may . . . proceed to return . . . to or stop at any port or place whatsoever . . . as the Master or the carrier may consider safe or advisable . . . and discharge the goods or any part thereof at any such port or place. When the goods are discharged from the ship, as herein provided, they shall be at the risk and expense of the shippers and/or receivers; such discharge shall constitute complete delivery and performance under this contract, full bill of lading freight and charges shall be deemed earned and the carrier shall be free from any further responsibility. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation, . . ."

Then there are two other clauses which don't relate specifically to ice but which are important clauses.

*Opening Statement on Behalf of Plaintiff*

Clause No. 31: "Full freight . . . to port of discharge . . . shall be considered completely earned on receipt of the goods by the Carrier . . .; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatsoever ships and/or [8] cargo lost or not lost.

"If there shall be a forced interruption . . . of the voyage at the port of shipment or elsewhere, any forwarding of the goods or any part thereof by vessels of the same line or otherwise shall be at the risk and expense of the goods."

Now, that clause, as you can see, is particularly pointed to this particular situation because it refers to ice or closure by ice and that is exactly what happened here, namely, closure by ice.

That clause has been passed on and held valid twice in the English courts and four or five times in the American courts, not in connection with ice but in connection with strikes and governmental interventions of various kinds.

One or two American cases that I can refer to briefly is the case of *The Wildwood*, where an American-flag ship loaded a cargo of copper near New York to be carried out to a Russian port in the Far East. This was at the very beginning of World War II and the owners of the ship heard a rumor that the ship would be captured by the British on the ground that this copper would probably go to Germany. They got so disturbed about this that they diverted the ship out [9] of the ordinary course and brought her to Portland and discharged all of the copper there and that, the Court held, was proper performance under the bill of lading in view of this clause.

*Opening Statement on Behalf of Plaintiff*

Then there was another case where an American-flag ship loaded cargo for Norway—this was also at the beginning of World War II—and when the ship got to the Norwegian port of discharge, they found the Germans were in control so they discharged only a small part of the cargo and then brought the rest of the cargo back to the United States which was the very last place where the owners of the cargo wanted it to be, because they lost sort of a subsidy by bringing this cargo back. But, anyhow, the Court awarded the owner of the ship not only the freight carrying it over but 50 per cent of the freight carrying it back.

Then there are strike cases where ships have delivered cargo to ports other than the port of destination because the port of destination was closed by a strike. I think there is a case very much along that line in the Court of Appeals for this Circuit.

Now, the defense of the defendants is—as it will be explained much better than I can by the attorney representing the defendants, which is in substance the United States, [10] but their defense as I understand it is that the plaintiff was wrecklessly imprudent in not getting the ship out of the Seaway before the closure.

Now, there were some negotiations about that on November 25th, I think it was. The plaintiff received a telegram. I can give you the reference to that in the stipulation.

The Court: Is it paragraph 16, Mr. Poor?

Mr. Van Emmerik: Paragraph 17, Your Honor.

Mr. Poor: Yes, here it is.

The Seaway, I might say, is managed from Cornwall, Ontario in Canada. The Seaway is partly under American

*Opening Statement on Behalf of Plaintiff*

control, some parts of it, but most of it is entirely in Canadian territory and it seems to be managed entirely from Cornwall, Ontario. This is part of the stipulation. It is on page 8.

The telegram reads: "In the best interests of all concerned we respectfully request ETA"—ETA means expected time of arrival—"of ocean vessels for Seaway transit re-approaching closing of the 1964 navigation season: 1 ETA upbound St. Lambert Lock"—Now, upbound means coming inward. In other words, Montreal is practically at sea level and as you go up in the Lakes, you get higher up. St. Lambert lock [11] is the last lock of the Seaway. It is very close to Montreal. That doesn't concern the plaintiff in this case.

"2 ETA downbound Port Colborne lock eight"—Port Colborne is not really in the Seaway at all; that's in the Welland Canal. The Welland Canal Connects Lake Ontario with Lake Erie. It's a canal that bypasses Niagara Falls and there are six or seven locks there, but the Welland Canal doesn't get into this case except very incidentally because the Welland Canal doesn't ordinarily close until December 15th. It stays open a long time.

"3 ETA downbound Iroquois lock seven." Now, that's the really important one. The Iroquois lock is on the Seaway and it's the nearest lock to Lake Ontario. In other words, if you are leaving the Seaway, the first lock that you reach is Iroquois.

Then on the very same day, Orient Mid-East Lines sent the following reply: "Yours today ETAs 1 None, 2 Olau Gorm seventh, Orient Merchant sixth"—those are the two ships. Now, when it says "ETAs 1 None," that meant they had no incoming vessels. Their ships were going out. Then the "2" refers to the Welland Canal. "3 Olau

*Opening Statement on Behalf of Plaintiff*

Gorm eighth"—that meant that the Olau Gorm would arrive at Iroquois on December 8th—"Orient Merchant seventh." Here is the important part [12] of the telegram, "Respectfully request immediate advices event authorities decide close Seaway sooner in order attempt alter arrangements."

Now, it is stipulated there was never any written reply to that telegram although it was received by the Seaway on the 25th. They were not willing to take the trouble to send anything in writing. There is a question and possibly a conflict of testimony as to whether any oral reply was given or anything in the nature of an oral reply was given.

Our testimony will be that on December 2nd, there was a telephone talk between Mr. Pendias, who is the general manager of the Eagle Ocean Transport—the Eagle Ocean Transport is the general agent of the plaintiff and for purposes of this case, they are identical—and the Seaway. And he says that on December 2nd—I won't try to go into all of it—in this telephone conversation, they did not tell him that these dates which had been given, namely, December 6th and 7th, were in any way improper and after that conversation, he felt safe in not hurrying up his vessels.

Of course, it is perfectly obvious and in view of the heavy penalty that a vessel suffers if she stays in the Seaway without any employment for four and a half months that if he had been told by the Seaway at that time that he should [13] get the vessels out, he would have done it and he could very easily have gotten the Olau Gorm out because she was only at Buffalo and that was only about a day and a half or two days sail from Iroquois Lock.

The Court: Let me interrupt you just a moment, Mr. Poor.

*Opening Statement on Behalf of Plaintiff*

Is that clause you read from the bill of lading?

Mr. Poor: Yes.

The Court: Does that cover layover time if you have to stay over?

Mr. Poor: It doesn't specifically provide that the shippers should pay overtime or anything of that sort; it simply allows the Carrier to discharge the goods at some other port in case the voyage is seriously interrupted by closure by ice.

The Court: But if he does discharge the cargo, he can't charge his layover time to the shipper?

Mr. Poor: No, he can't charge—He can charge for services rendered the goods.

The Court: In landing the cargo.

Mr. Poor: Yes.

Now, that brings me to one of the other points here because, as Your Honor will see, in this case we were asked [14] by the shippers, specifically asked, to allow the cargo to remain on board until the winter was passed. By allowing the cargo to remain on board, we assumed a considerable risk. It required that we had to keep the cargo ventilated, we had to keep members of the crew working on the ship, and so forth, and furthermore, there was a possibility of liability in case there was a fire or explosion or something ran into the ship, or something of that sort, or even possibly a deterioration of the cargo. Fortunately, there was no loss of that type.

Now, as is shown here, it has been the practice for many years for ships not to clear the Seaway until December and in recent years, they have been clearing as late as December 13th and perhaps even later than that.



*Opening Statement on Behalf of Plaintiff*

I don't know whether this is necessary to be shown but the evidence also shows that the shippers of this cargo, who ship large amounts of cargo, knew that the ship would not try to reach Iroquois by November 30th.

Now, there is another point which is more perhaps a point of evidence here and that is that the same question has been decided adversely to the Government by the Maritime Administration. One of the ships which was trapped in the Seaway was an American-flag ship called the Flying Independent. [15] The Flying Independent was loading very close to the Orient Merchant. It was loading at Kenosha, Wisconsin, which is right in between Milwaukee and Chicago. And the Flying Independent left Kenosha even later than the Orient Merchant. The Orient Merchant sailed ahead of the Flying Independent but by the time both of them arrived at the Seaway, the Seaway had been closed.

Then the question came up as to whether the owners of the Flying Independent were entitled to compensation from the U. S. Government under their subsidy contract. They were not entitled to any compensation unless the ship was prudently operated; and the Maritime Administration decided that under the circumstances of the case, the owners of the Flying Independent were not at fault and they received compensation. That is shown at more length, of course, I think in the stipulation of facts.

Now, I am not quite sure that I have actually covered the crucial point here that these two ships did arrive at Iroquois on, I think it was, December 6th and 7th; but on December 5, which was a Saturday, the Seaway Administration had apparently reached a conclusion and decided to close the Seaway at midnight on the 5th. They were

*Opening Statement on Behalf of Plaintiff*

supposed to give at least short notice of closure; that's what their [16] notices said they would do. The only notice they gave was a notice at two o'clock in the afternoon which was sent out—It's referred to as being broadcast. I don't know exactly what that means. But if a ship was in port, a broadcast of that sort would not be picked up by the ship's radio because the ships are required to close their radios while they are in port.

In any event, it was too late for either of these two ships even if they had heard the broadcast, which they did not, it was too late for them to get to Iroquois which they would need to do by midnight to get through. The Olau Gorm had left Buffalo practically at midnight on the 4th and arrived on the 6th but by that time, Iroquois had been closed; and the Orient Merchant, it's a four-day steaming from Milwaukee which was her last port to Iroquois, and she arrived on the 7th I think.

Mr. Pendas, who was in charge of the routing of these ships, didn't know that they had been shut out until the 6th which was a Sunday. He was notified by one of the Masters, I believe, who sent a message which was picked up by one of the employees of Eagle Ocean Transport who relayed it to Mr. Pendas, and Mr. Pendas strained heaven and earth to try to get the Seaway to open Iroquois and let the ships [17] come through.

Some ships were treated exceptionally, one or two at least, and were allowed through but these two ships were not permitted to go through. He called everybody he could find in the Seaway. Every time he would call up one man, they would say, Well, call somebody else, and he was not able to contact anybody. He tried diplomatic means. I believe that he may have called the State Department in

*Opening Statement on Behalf of Plaintiff*

Washington, the Greek minister there since the Orient Merchant was a Greek ship. The Greek minister tried to help but everything failed and the only thing to do was to let the ships remain in the Seaway over the winter.

Mr. Pendas considered where they should go and he thought that the best place was to have them go to Toronto, so they both went to Toronto and stayed at Toronto all during the winter and then were reactivated in the spring.

Before that, however, there is a very important agreement which was entered into between the parties here. It was entered into on the 3rd of March of 1965. That is Exhibit "I" of these exhibits which are annexed to the stipulation. It is not a very long agreement. The substance of it is that various things shall be done without prejudice, [18] leaving the plaintiff free to sue for additional freight, for compensation for keeping the cargo, and that the plaintiff's rights were not prejudiced because the cargo was not actually discharged.

After the spring came and the Seaway was opened, the Olau Gorm proceeded through the Seaway and delivered her cargo at destination without further incident of importance.

The Orient Merchant had not been able to load a full cargo. Of course, the ship owner doesn't want to send his ship on a long voyage until he has a full cargo because the freight on a part cargo may not even pay expenses and certainly won't result in a profit, so the Orient Merchant proceeded westward and loaded some additional cargo from the defendants, that is, from CARE and so forth. They had some additional cargo they wanted to ship. I think the Orient Merchant was about 3,000 tons short of cargo and they loaded that additional cargo and then proceeded to go towards the Seaway. Unfortunately, at a place called Port

*Opening Statement on Behalf of Plaintiff*

Colborne, which is at the entrance to the Welland Canal, while the ship was being piloted by a U. S. compulsory pilot, the pilot—I don't know whether it was negligence or not—communicated with the Welland Canal and they said, "Come on in" and somehow he got out of the way and ran the ship on the rocks, and they couldn't get the ship off. The ship lay on the rocks for two or three weeks. Then, finally, they did discharge some cargo and got the ship off and, ultimately, with a great deal of difficulty got her through the Welland Canal but it was then found that she was a constructive total loss and in peril.

Furthermore, there was a perishable cargo on board which couldn't be delayed any more so the result was the voyage was terminated right then and there; and that ends the whole story, so to speak.

I mentioned the stranding here. I don't think it affects the legal rights and liabilities of the parties in this suit, but it is a fact and I think it has to be mentioned just because it is something that actually happened.

I think that gives more or less the story. If there are any questions that you would like to ask, I will do my best to answer them.

The Court: As I say, I have just thumbed through this file. I don't pretend to be too familiar with it.

As far as the Orient Merchant is concerned, the ship that was wrecked, are there any claims being made as to carriage?

Mr. Poor: Not in this suit. There are some suits pending about the Merchant in New York.

[20] The Court: But that is not involved in this case?

Mr. Poor: It is not involved in this case.

The Court: Well, I think that gives me a pretty good picture of your claim.

*Opening Statement on Behalf of Plaintiff*

Now, I will hear from the Government and see how they handle it.

Mr. Van Emmerik: If Your Honor please, my name is Allen Van Emmerik, Department of Justice, representing the Government. The Government is the real party defendant in interest, if that is the proper term to use.

Mr. Golin represents the Seventh Day Adventist Welfare Service and I believe he wants to enter an appearance for the record and ask to be excused.

Mr. Golin: If it please the Court, since, as indicated by counsel for the plaintiff and the Government, the respondent Seventh Day Adventist is merely nominal at this posture, I request permission of the Court to be excused at this time if counsel for plaintiff and the United States have no objection.

Mr. Poor: No objection.

The Court: By the same token, we will note the appearance of Mr. Hawes for CARE and excuse him too.

Mr. Van Emmerik: For the record, there is no [21] objection by the Government.

The Court: Very well.

*OPENING STATEMENT ON BEHALF OF DEFENDANTS*

Mr. Van Emmerik: As a result of the events which Mr. Poor explained to Your Honor, the Government is in the unenviable position of having to pay two freights, if plaintiff's case is accepted, and over-winter storage expenses in a colossal amount, plus the cost as in a consent judgment note, interest and collection expenses in collecting the so-called "first freights."

Now, for this staggering sum of money which amounts to nearly a million dollars on plaintiff's view of the case, the Government got about one-third of its cargo delivered. This arose because the Olau Gorm is about half the size of the

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Orient Merchant. Its dead weight tonnage is 6,100 tons; the Orient Merchant is 11,900 and some change.

The Merchant stranded, was declared a constructive total loss, and we had to take care of moving her cargo on at a new freight.

One full freight has already been paid for this one-third performance. Plaintiff here seeks a second full freight and over-winter storage expenses.

To go into the background a little bit, perhaps it [22] would be useful to state a bit of chronology: The Olau Gorm arrived in the Lakes to commence this undertaking with cargo in her hold, some cargo for delivery in the Lakes, some which had to be discharged before any relief cargo could be taken aboard—and by “relief cargo” I mean surplus agricultural products for starving people overseas. Some of her cargo then in her was discharged while relief cargoes were being loaded. She arrived about early mid-November.

The Merchant didn't arrive on berth in Milwaukee until the 26th of November. This is one day after this exchange of telegrams about when are they going to get out. The Merchant, I'm trying to make the point, arrived very late in the Lakes, exceedingly late.

The Court: Well, is Mr. Poor right in his statement that we are not concerned with the Merchant here?

Mr. Van Emmerik: No, sir. They seek freights in the Merchant. They seek over-winter storage expenses in the Merchant. They seek to be paid for the collection costs and interest on “first freights” delayed paid involving the Merchant.

I think what Mr. Poor means—I don't think I am misstating him—is the stranding and the consequent loss to the Government is not involved here.

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[23] There were two separate events: In December of 1964, both vessels were frozen in. That's what we are dealing with. On April 27, 1965, the Merchant stranded. We are not involved with that, except to point out to Your Honor that by virtue of the stranding, we got about one-third performance. Now, this matter is in suit in New York for the Government's costs in on-carriage of the goods in the Merchant, plus the attendant expenses for getting the goods out of the Merchant as she lay on the shoals partly and then partly——

The Court: Just to satisfy my own thinking, we are still concerned with the Merchant having to turn around and layover in Toronto or wherever it was?

Mr. Van Emmerik: Yes, Your Honor. We are concerned with the prudence of having her arrive on berth so late. We are concerned with the prudence of failing to clear earlier than she did, just as we are with the Olau Gorm. We are also concerned with events between December 1964 and April 1965 insofar as they relate to storage, over-winter storage.

Now, the Government is in this unenviable position by reason of certain bills of lading which contain clauses which Mr. Poor has already pointed out to the Court; but I would like to state for the record that although such clauses [24] as the "closure by ice" clause have been sustained many times, this is not a closure by ice situation before the Court today. It's a case of pure negligence in getting caught by the ice.

The closure by ice contemplated in the bill of lading here is that closure which results from an unforeseeable act of nature, not the dilatory management of the vessel which gets the ship frozen-in in an ordinary annual cyclical

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freeze-up which has got to occur sometime, ordinarily in the month of December, early December so far as Seaway operations are concerned.

This operator is stipulated to be—"this operator" being Orient Mid-East Lines—an expert, an experienced Carrier in the Great Lakes trade. We expect that by the time the proofs are in it will be shown that they did not measure up to what any reasonable man would consider to be expert conduct.

We expect the proofs will be that adequate warning and timely warning was given to Mr. Pendias for Orient Mid-East Lines and disregarded.

Mr. Poor adverts to some ad hoc custom for vessels to clear after November 30th, which is the formal closing date of the Seaway. Certainly, this custom exists insofar as [25] it can be called that. That is to say, vessels in great numbers do clear after November 30th every year; but the point is they do clear, that is, the custom is they listen when the Seaway talks and if the Seaway suggests that it will be prudent to move out, they move out. They don't sit around looking to take on more cargo to get their ships more full and more down in order to cut their losses.

Loss is attributable to a late arrival on the Lakes with respect to the Orient Merchant. Loss with respect to the Olau Gorm because she was within moving out distance of the Seaway when warnings were given. The warning I refer to here in connection with Olau Gorm is that warning which Mr. Poor has already adverted to of December 2nd when Mr. Pendias initiated a telephone call to the Seaway to ask opinions.

There will be a conflict. I understand now that Mr. Pendias says that the result of that conversation was most



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bewildering to him. The other end of the conversation will testify today or tomorrow that there was nothing bewildering about it. He was told categorically that if that ship were under the command of the Seaway, it would be at Port Colborne and on its way down as of the time of that telephone call.

It will no doubt be stated in testimony that the [26] Seaway did not measure up to its responsibilities. If this advice is not good enough to get a vessel moving, I don't believe there is going to be any form of advice that will suffice to get a vessel out of the Seaway if it just wants to sit around, rely on bill of lading clauses which it wrote in the bill of ladings, and collect its freights come what may.

Now, at this moment, Your Honor, I am actually going to ask for a little guidance. Mr. Poor has adverted to the matter of the Flying Independent, as he stated, under the circumstances of her case being kept in subsidized status over winter. Now, this was put in the stipulation at the request of the plaintiff's counsel. This and several other irrelevant matters, to my mind, were put in on the theory that when you stipulate, you stipulate anything that is a fact and then later ask the Court to reject that which is irrelevant although perhaps a fact in the case. This was the prime fact in the whole stipulation which I deemed to be irrelevant. There were about four which I specifically excepted to in the pretrial order. I was wondering—this is the guidance I am seeking—at what point will we have an opportunity to object to certain stipulated items?

The Court: Well, I think it is a little early [27] right now.

Mr. Van Emmerik: All right.

The Court: Until we get some evidence in, until I can get some balance and feel of the case, I don't want to rule

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that something is material or irrelevant. Let me get some of the testimony in and then I can judge better.

Mr. Van Emmerik: I should like to read into evidence the stipulated facts which I deem important to the Government's case. I suppose plaintiff will do the same, if that is the procedure, and at that time I will have an opportunity to object.

The Court: Yes.

Mr. Van Emmerik: Fine. But I would like it understood at the very beginning that that particular one, I would object to.

The Court: You have your reservation to object.

Mr. Van Emmerik: Yes, sir.

Now, not to argue the law but Mr. Poor adverted to two cases, The Wildwood and Moore-McCormack case—I couldn't begin to pronounce the plaintiff party in that case.

The Wildwood case I think, although plaintiff relies on it, points up the conduct expected of a carrier. I don't believe the facts of that case are precisely as Mr. Poor [28] stated them. He stated that according to a rumor, the ship loaded with copper products diverted from a Russian destination and put in at another port where it was discharged and was eventually awarded full freights. I believe what happened was another ship of her flag, under the same flag, was already taken into custody by the British under their contraband cargo embargo on Russian ports; that after this and after exhaustive attempts to find out the true status of this British embargo, the Wildwood was excused from full performance and permitted to retain freights upon performing, so to speak, by delivery at a port of diversion.

The same with the Moore-McCormack case—and I am even less certain of these facts—I believe what happened

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was the ship arrived in a Norwegian port, laid about a bit and then before she started to discharge, the Germans invaded. The Germans were not in possession of the port when she arrived.

These two cases and the other cases which Mr. Poor has adverted to concerning strikes set the tone, I believe, for the occasions when a carrier may excuse itself from full performance according to its undertaking. All of the cases which plaintiff cites have to do either with war or strikes, and there are a few more capricious things in the [29] experience of mankind than war or strikes, but there is nothing capricious about the Great Lakes freezing.

The Government has cited four cases indicating, both in federal and certain state courts, that a freeze-up is certainly expectable. It will come. There is nothing capricious about it except as to which day nature will choose to freeze-up, but it is going to happen within a certain time span. Prudent conduct requires that a carrier avoid that time span and clear before real danger arrives. Plaintiff complains he wasn't too fully informed about this.

What the Government intends to suggest is that if you are not fully informed, the prudent thing to do is give yourself the benefit of any doubt and to clear out the sooner and not try to ride a marginal situation until you are eventually trapped in, which comes to the legal point which I raise in most general terms only because it's going to be important to discuss the case and take testimony as to what standard applies to a carrier under these bills of lading clauses, whether he may invoke them only if he has not been guilty of arbitrary or wreckless conduct or whether he is precluded from invoking them if he has been less than prudent in his conduct, i.e., acted unreasonably under the circumstances.

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[30] It is the latter which the Government contends here. It is the former which the plaintiff contends, we think erroneously. It relies on certain cases which use the terms "arbitrary" and "wreckless" but right alongside are the terms "negligent," "with or without fault" or "prudent."

Now, this standard is not new to the law. It's one that is used every day, reasonable and prudent conduct under the circumstances; and there is no reason why it can't apply to this case as well as any other. There is no reason why a carrier which writes into its bill of lading certain clauses which flatter it greatly should be entitled to rely on those for vast second freights and storage charges when it got itself into the mess itself.

It should be remembered on the Alcoa case that these clauses are in derogation of the common-law on the subject, which is that a common carrier of whatever sort earns his freight only upon delivery. It is in effect an insurer at common-law. Because of this rather intolerable burden on the carrier, it became customary to write into the bill of lading certain clauses exempting it from all responsibility because carriers were largely in a position to overreach, which is why the common-law liability was imposed in the first place. They use this overreaching power to write-in bill of lading clauses [31] such as we have here today. They should be strictly construed against the carrier. They should not be available to the carrier except as he has behaved reasonably and prudently under the circumstances.

We suggest that here there was no such reasonable and prudent conduct; that after November 30th, it was well known to the trade that the Seaway was open on a day-by-day basis only and that closing notices would come at the very last moment, yet the Orient Merchant was way over at the other end of the Lakes, virtually four days away. It

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actually took her three days, nineteen hours to get from Milwaukee to Prescott which is just outside Iroquois Lock. It took the the Gorm thirty-eight hours to make that trip from Buffalo. They both arrived at about the same time. The Gorm arrived at 13:10 which is 1:10 in the afternoon; the Merchant arrived at 13:47 in the afternoon of December 7th, or thirty-two hours, if I am not mistaken, after closure. That is quite a gap considering the exigencies of the situation.

Mr. Poor has complained that the Seaway did not send Eagle Ocean Transport a special notice in writing. The proof will be that the Seaway cleared after November 30th 76 ships, 80 if you include there four that are involved here.

Perhaps this hasn't been made clear, Your Honor: [32] There are the two ships we are involved with here and two others, the Flying Independent and a Chinese vessel called the Van Fu, were frozen-in, were caught by the Seaway closure.

These 76 vessels cleared after November 30th in a five-day span. Now, that is fifteen vessels a day. That is just about capacity for the Seaway. The Seaway can clear ten to fifteen vessels in a day, in a normal day of operations. Now, you can see that with winter coming on, with ice closing in, that operations are going to be slowed considerably.

I think before the testimony is all in, Your Honor is going to understand just how hectic these closing days can be for the Seaway Authorities. And I think it won't appear the least bit remarkable that the Seaway did not extend a personal invitation to Orient Mid-East Lines and ask them, "Won't you please get your ships out." They did telephone them which, I think, is about the best to be expected under those circumstances. The Seaway is not supposed to make

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up plaintiff's mind for them. We, as shippers, are entitled to reasoned judgment on the part of the ship owner. It's up to him to get the information. The Seaway gave it as much as it could orally by telephone. To put it in writing wouldn't change matters a bit, except to this undue emphasis to the lack of written response as though the Seaway [33] didn't quite see fit to show the carrier when it was prudent to leave. It will be shown that orally, it did.

I might mention at this point, Mr. Poor has asked me if during the testimony of Mr. Pendias, the Seaway witnesses on behalf of the Government might leave the room. We agree to this. It was not raised before. We do agree.

The Court: We will have a rule on witnesses.

Mr. Van Emmerik: Yes, Your Honor.

The Court: May I ask this question out of curiosity: After these ships arrived at Iroquois, was it still possible to get through the Seaway or were weather conditions such that they couldn't have gone through?

Mr. Van Emmerik: Weather conditions forced the closure of the Seaway. That will be our proof. I think plaintiffs don't believe a word of this.

The last ship to get through Iroquois Lock got through at 0048, 48 minutes after midnight on the morning of December 6th.

When we say it closed at midnight, this is the midnight that separates December 5 and 6. It is at that midnight that the Seaway was to close. A vessel squeaked in at that time and left Iroquois Lock downbound—her name was Jean Lafitte—at 0048.

[34] The Court: After that, there was an actual freeze-up?

Mr. Van Emmerik: The freeze-up occurred at the other end of the locks, at St. Lambert Lock. The Seaway runs

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toward the northeast. The St. Lambert Lock being the most northward lock and also being furthest removed from Lake Ontario and its warming effects, ices up first.

The last vessel to get through St. Lambert before it was rendered totally, completely physically impossible for a vessel to get through that lock—a vessel of that size—exited between six and seven a.m. on the 6th, either that or three-thirty. At least, it was early in the morning on the 6th. One upbound vessel, a laker, that is to say an inland vessel not an ocean-going vessel, came upbound through that same lock at eight p.m. or eight-fifteen p.m. on the 6th, consequently, St. Lambert was physically closed before the Olau Gorm and Orient Merchant presented themselves at Prescott for transit.

The Court: The point I want clarified is even if the Seaway officials had let them through at Iroquois, they couldn't have gotten out to the ocean. Is that correct?

Mr. Van Emmerik: No, sir. As a matter of fact, the testimony will be that in this particular closure, there was some doubt that those vessels that were allowed through Iroquois could possibly get through St. Lambert. They did. [35] But one of the witnesses who will testify in this case actually went to St. Lambert from Cornwall, which is the center of operations, to see whether or not it was going to be physically possible to let those ships that were already in the Seaway exit the Seaway through St. Lambert. St. Lambert is exceedingly close to Montreal.

I might mention that the witnesses might occasionally speak of Montreal and they mean St. Lambert. It is that close.

Now, a word on damages and the quantum thereof. The stipulation will show that the amounts of money we

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are speaking of are \$382,000 for second freights, this being the total of the first freight; \$575,000—give or take a thousand or two—for over-winter storage expenses; and about \$10,000 for the interest and attorneys fees involved in collecting the late paid first freights.

First freights were paid pursuant to an agreement of March 3, 1965, copy of which is appended as Exhibit "I" to the stipulation. This agreement, as Mr. Poor said, was basically intended to get the goods to destination for one freight, reserving all rights and all parties. However, the Government and the voluntary agencies entered into that agreement from the position that absent delivery, Orient Mid-East was not [36] entitled to first freight either.

So that I think the entire case stands or falls on the reasonableness of Orient Mid-East Lines getting the ships frozen into the Lakes; that is to say, if they were unreasonable, they do not get second freights; if they were unreasonable, the over-winter storage expenses are for their account and not for the Government account. If they were unreasonable, they are not entitled to first rates either absent delivery, so that they are not entitled to anything for the delayed payment of the first freights because those freights were paid on a second undertaking expressed in the agreement of March 3 to effect delivery in the spring, actually.

The Court: What did they get on first freights, how much?

Mr. Van Emmerick: On first freights, \$382,000, and there are some more hundreds in there. It's enough for me to handle \$382,000.

In that \$382,000, it is stipulated that slightly over \$102,000 is in the form of expenses that those people would not have incurred twice. These are Seaway tolls and they



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were made to the Seaway. They never made them twice, only once; loading expenses, stevedoring costs, port agency fees, port entry fees, port clearance fees. All these costs, they never incurred twice and would not. Because of their own wrongdoing, they are seeking to be paid to profit by money [37] they will never have to pay out.

Therefore, the second freights, so-called, for purposes or discussion throughout this case are divisible into two categories: One amorphous sum of about \$200,000 which cannot be isolated as profit or loss or anything else, and one sum of \$102,000.

Now, the Government, of course, says they are not entitled to either but if they are entitled to second freights, they certainly ought not to have those moneys which they never expended twice. It would just be unconscionable. Even if we shared the risk, which I think is the position that plaintiff takes, then we should not share it for the whole risk but only for what would be left over to the carrier after the payment of expenses which it really didn't have to pay twice.

The second group and that which is most grossly and vastly overstated, I think, is the over-winter storage expenses. It happened that the two ships turned in at the Port of Toronto. The Port of Toronto has a tariff, as many ports in the United States have. It has a Board of Harbour Commissioners and these people promulgate a tariff. That tariff contains as the only rates for storage of cargo certain rates which it styles "demurrage rates."

[38] We expect the proof to be that demurrage rates are designed as a penalty. I think Your Honor will almost gather off the face of the tariff that the purpose of these demurrage rates are to penalize leaving cargo on the premises of the Harbour Commissioners' piers over and above

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a certain free time allowance. The charge, therefore, is exorbitant. After an expiration of free time which for discussion purposes is about twenty days—the cargo may sit on the premises for twenty days without incurring any charge. On the twenty-first day through, I believe, the twenty-fifth or twenty-sixth day, through the first five days, the Harbour Commissioners would impose the charge of a cent and a half per 100 pounds per day; after the expiration of those five days until the goods are removed, three cents per 100 per day. These are colossal rates.

The ordinary bag of flour or bag of grain or bag of rolled wheat, or whatever commodity—some of the commodities were in smaller quantities, but a bag of grain is 100 pounds. Three cents on each bag of grain for each day that those goods remained on the pier for four and a half months, that's how they get this colossal figure of nearly \$600,000. This is grossly in excess of ordinary commercial storage rates. It is a penalty rate when what should be applied, if anything—the Government [39] doesn't concede this for a minute—is the rate that a commercial warehouseman would charge if he wanted to attract business and not push it off the way the Harbour Commissioners do. They have no interest in cluttering the pier, they want to move it on so they soak the cargo owner.

Now, secondly, in that same \$600,000 figure plaintiffs include trucking and handling expenses on a certain analogy. I should refer to the analogy which I believe plaintiffs rely on concerning second freights: The theory on which they would charge full second freights is that had they exercised what they concede to be their rights under the bills of lading and dumped the goods on the pier right after December 5, 1964, and merely had said to the shippers, "Come and get it, it's in Toronto," that they could

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then in the spring have loaded a second cargo and have exited.

On this analogy, they are not entitled to that \$102,000—on this analogy alone—because if they had taken on a second cargo, they would have had loading expenses, they would have had the stevedoring expenses, they would have had the port agency fees at the port of loading. They would not have had such things as a second set of Seaway tolls, a second set of discharge fees and the like, but they would have [40] had considerable expenses involved in getting the cargo aboard. Therefore, on their own analogy, they are not entitled to full second freights.

Likewise, on their own analogy, they are not entitled to handling expenses for the over-winter storage costs.

Apparently, plaintiff proceeds on the theory that any financial loss suffered by the Government by virtue of the freeze-in, regardless of whether it's related to the eventual services which plaintiff provided, anything so long as it resulted in an outflow from the Government's pocket must result in an inflow into the plaintiff's pocket—and that, of course, is a false lead.

If plaintiff had exercised what it considered to be its rights and dumped the goods, the Government would have had to pay to truck them off the pier and into storage unquestionably; but at no time during the winter did plaintiff hold itself out to providing such trucking services. The fact is that the goods stayed in the ship. If plaintiffs are entitled to anything, they are entitled to a reasonable storage allowance but not for a trucking that never happened just because had it happened, the Government would have paid [41] somebody else the trucking costs. This trucking is not related to any service which the plaintiffs afforded the goods under their bill of lading which says that services

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performed over and above the carriage of the goods will be billed at the cost to the shipper.

Now, these trucking expenses alone run into a considerable amount of money. It is up to plaintiff, I think, to show how much. It's up to plaintiff to prove its damages. It's up to plaintiff to prove it and not rely on the stipulation which says that assuming the Toronto demurrage rates to apply, the following is the quantum of their damages.

Now, the final issue of damages, the matter of late payment expenses and interest. As I say, if plaintiff is held reasonably to have missed sailing through the Seaway, it may have an entitlement to it. I think the case will prove out that plaintiff was unreasonable in delaying so long and ought not to have anything.

Consequently, to sum up, the Government's view of the damages is that having delayed unreasonably, plaintiff is entitled to nothing. It is entitled to no second freights, it having obligated after an interruption of four and a half [42] months to carry the goods to destination for the full first freight, which it got. Secondly, that it has no rights to over-winter storage expenses; that if it got itself trapped in the Lakes, then whatever financial embarrassments might follow from this are their account and not for the Government's account. And, thirdly, that it is not entitled to any late-payment expenses because the payment was late because the Government and the volunteer agencies, CARE et al, did not feel they were entitled—and I think for good reason—to the first freights. There was a good faith refusal to pay and a good faith negotiation, resulting in payment upon the promise of delivery.

Has Your Honor any questions?

The Court: Is the Government asserting a counterclaim for the first freights?

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Mr. Van Emmerik: No, sir. We are asserting a counterclaim of sorts in the New York action for the first freights.

Let me make one thing clear just so we don't look entirely like bad guys: The Olau Gorm delivered her cargo in the spring without any relevant incident—there was a small \$2,000 or \$3,000 cargo claim but that's minimal compared to most cargo claims. The over-winter storage was entirely [43] satisfactory. Plaintiff took good care of the cargo. We have no relevant claim for any cargo spoilage. This included the fact that they opened and closed hatches, depending on the weather. They kept the blowers going. They provided valuable services. We don't deny this. We do deny their right to be paid for it because they incurred those expenses through their own fault, and I mean fault in the reasonable and prudent operator under the circumstances context.

The Court: All right. I think I have got enough background to be able to listen to testimony intelligently.

We will take a short recess, and in the meantime, would you sort out your witnesses so that we do have a rule on witnesses.

We will take a five-minute recess.

(Whereupon, at 3:05 P.M., a recess was taken.)

Mr. Poor: Do you want to have a witness called immediately, Your Honor, or do you want to do something about this stipulation of facts which was mentioned?

The Court: I think, Mr. Poor, that if we go ahead with the testimony, I will be better able to judge the relevancy of the stipulation later on.

Mr. Poor: Very well.

*Orestes P. Pendias—Direct*

[44] Whereupon, ORESTES P. PENDIAS called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Poor: Your witnesses are still in the courtroom.

Mr. Van Emmerik: Your Honor, may I ask the Canadian witnesses to leave?

The Court: Yes. Show the witnesses to the witness room.

Maybe we can excuse these witnesses for the day.

Mr. Van Emmerik: I know they would like it.

Mr. Poor: How long does the Court expect to sit, Your Honor?

The Court: Until four or four-fifteen.

Mr. Poor: Well, I think we might as well excuse them for the day, Your Honor, because if there is any cross-examination, it will take us to four o'clock.

The Court: Would you report back tomorrow morning at ten o'clock, gentlemen.

Mr. Van Emmerik: I have one other witness who will follow these three. May I excuse my entire witnesses, Your Honor?

The Court: Surely. Excuse all your witnesses. There is no sense in detaining them if you aren't going to [45] need them today.

(Prospective witnesses left the courtroom.)

*Direct Examination by Mr. Poor:*

Q. Mr. Pendias, will you please give your name, age and place of residence? A. My name is Orestes P. Pendias, O-r-e-s-t-e-s P-e-n-d-i-a-s; age forty-seven. I live at North Rock Ridge, Greenwich, Connecticut.

*Orestes P. Pendas—Direct*

Q. What has been your experience in the shipping business since you left school? A. I have been in the shipping business for the past twenty-eight years. I started out in 1939 with States Marine Corporation and I was with them until about 1942. Thereafter, I went to sea for three years; and after the War, I opened my own office and became, eventually, general agent for the Goderro Lines which is an Argentine cargo line service. And in 1949, I joined the Hellenic Lines as assistant to the general manager in New York. In 1958, I joined Eagle Ocean Transport and helped form Orient Mid-East Lines where I am general manager.

Q. What is the connection between Eagle Ocean Transport [46] and Orient Mid-East Lines, the plaintiff in this case? A. Eagle Ocean are general agents for Orient Mid-East Lines.

Q. I will show you a telegram addressed to Orient Mid-East Lines from the Seaway Authorities, dated November 25, 1964, which is Exhibit "F" attached to the stipulation of facts. (Exhibit shown to the witness.)

What was done about that telegram? A. We gathered the information that the Seaway requested and on the same day, we sent the Seaway a telegram.

Q. I think that telegram is Exhibit "G". Would you read it into the record, please. A. Exhibit "G" is a telegram addressed to D. MacKenzie, St. Lawrence Seaway Authorities, Cornwall, Ontario: "Yours today ETAs 1 None, 2 Olau Gorm seventh Orient Merchant sixth, 3 Olau Gorm eighth Orient Merchant seventh. Respectfully request immediate advices event Authorities decide close Seaway sooner in order to attempt alter arrangements." And the signature is "Oremeast."

Q. Did you ever receive any reply in writing to that telegram? A. No, sir, I did not.

*Orestes P. Pendas—Direct*

[47] The Court: Mr. Poor, my Exhibits "F" and "G" both have lines drawn through them. Does that indicate anything? Is it anything significant?

Mr. Poor: I don't think so. I think Mr. Pendas can explain that.

The Witness: Yes, sir. This is a xeroxed copy of our cables and generally when we finish reading them, we mark them for our files.

The Court: It is just a clerical thing?

The Witness: Yes.

The Court: All right. Go ahead.

*By Mr. Poor:*

Q. Now, after November 25th and before December 5th, did you engage in any telephone conversation with the Seaway? A. Yes. I phoned the Seaway on December the 2nd.

Q. And what did you say to them, and what did they say to you? A. Well, I called them to see if I could get permission or get their opinion as to whether or not I could stay beyond the dates I had given them on my telegram of November 25th. The Port Captain had indicated to us that we couldn't load all of the cargo that we had available to load out of Milwaukee to sail in time to get to the Seaway on the dates [48] given in my telegram of the 25th of November. I believe I was talking with Captain Butt and he didn't think that it would be advisable to stay the extra day, so, therefore, I decided the only thing to do was to have the vessels sail and try to make the dates we had given.

The Court: What was that Port Captain's name?

The Witness: It wasn't a Port Captain; it was Captain Butt of the Seaway Authorities.



*Orestes P. Pendas—Direct*

The Court: How do you spell it?

The Witness: B-u-t-t.

*By Mr. Poor:*

Q. Are you sure that Captain Butt was the only one with whom you talked? A. He's the only one I can recall. Why I remember him—I said Captain Butt—I remember that he had an accent this fellow, a Scottish or Irish accent. I never met the man but I recall the accent.

Q. You don't know him by sight? A. No, I don't.

Q. Do you know if he has been in court today? A. I assume that he was here. I wasn't introduced to him. I wouldn't know him.

Q. All right. Did you, after this conversation which [49] took place on December 2nd, immediately give any orders to either the Olau Gorm or the Orient Merchant as to sailing? A. Yes, I instructed the Port Captain with the Orient Merchant to sail the vessel at five o'clock the following day with whatever cargo was on board and shut out or leave behind any cargo that couldn't be loaded by 5 P.M. on the 3rd of December, and the vessel sailed.

As to the Olau Gorm, of course, she was a whole lot nearer the Seaway and, eventually, I ordered the vessel to sail with whatever cargo she had on board on the 5th, the idea being we wanted to make the dates we had given the Seaway by telegram on November the 25th.

Q. Do you remember the time when the Olau Gorm sailed from Buffalo? A. I believe it was near midnight of December 5th, Mr. Poor.

Q. Do you remember how much cargo the Orient Merchant left behind at Chicago and at Milwaukee? A. I think the total was about 2,200 tons. I think it was roughly 600-odd tons in Chicago and 1,600 tons in Milwaukee.

*Orestes P. Pendas—Direct*

Q. How long does it take a vessel of the type of the Orient Merchant or the Olau Gorm to pass through the Seaway downbound? [50] A. Usually, it's about a day or so or twenty-four hours.

Q. Now, when did you learn that the Olau Gorm and the Orient Merchant would not be allowed to pass through the Seaway? A. I received a phone call on the morning of December 6th—that was Sunday morning—at my home from one of my assistants. He had received a radio telephone call from the master of the Olau Gorm to the effect that the pilot told him that the Seaway was closed at midnight December the 5th.

Q. What did you do then? A. Well, I got the number of the station up at Cornwall and eventually, I got the home numbers of Captain Butt, Mr. MacKenzie, Mr. Burnside.—I can't think of who else. I got as many people as I could on the phone, asking them to please let the Olau Gorm proceed down to the Seaway. Of course, I continued these efforts even beyond that Sunday. On Monday, I did the same thing. We even made an approach to the State Department here and I think we applied to the Greek Embassy up in Ottawa. We did about everything we could think of to get the vessels through, but unsuccessfully.

Q. That applied to both the Orient Merchant and the Olau Gorm? [51] A. Well, it did but in the case of the Olau Gorm, seeing as she was so very close to the Seaway, I pleaded with the officials up in Cornwall to let the vessel try to get down to see if she couldn't catch the convoy and I was told that, Well, by the time she gets to the Iroquois Lock—which is the western end of the Seaway—that it would be just too late.

As it turned out, I think we stood a fair chance of getting the vessel through. I even volunteered to let the ship try to

*Orestes P. Pendias—Direct*

get through and said that if the vessel goes down and she can make the passage through, the tug was my expenses. I said, Let the vessel try. We will never know until we really try whether the ship can or cannot go through. But I couldn't get permission from anyone to let the vessel try to go through at Iroquois which, incidentally, was not icebound.

Q. Were you in touch with any towing company? A. Well, eventually during the course of the week, we contacted McAllister Towing Company of New York and, in their opinion, we wouldn't have any trouble getting through. They said if need be, they could have pulled us through.

Q. Now, if the Olau Gorm had been allowed through the Seaway, when and where would you have made a re-delivery of [52] the Olau Gorm to her owners? A. Well, if she had gone through, I expect that she would have completed her voyage or completely discharged in the Mediterranean by the early days of January and she would have been re-delivered to her owner in the Mediterranean.

Q. What was the daily hire you were paying on the Olau Gorm? A. She was being paid 405 pounds sterling, which is about a little less than \$1200.00 a day plus, of course, fuel expenses and so on.

Q. What experience had you had as general manager of Eagle Ocean in transiting the Seaway with vessels of the Orient Mid-East? A. Well, the Seaway opened up in '59 and we were one of the first lines to service that area and I think from '59 up until this freeze-up, we must have had at least 70 vessels in and out of the Lakes.

Q. Do you remember when your last vessel passed Iroquois Lock in 1963, the preceding year? A. Yes, I believe that was the Zenobia Martini and I think she went through about the 10th of December.

*Orestes P. Pendas—Direct*

Q. I see. Did you at any time withhold any information about these vessels from the Seaway? [53] A. No.

Q. The shippers of this cargo, that is the voluntary agencies which are CARE, Lutheran World Relief, Church World Services and Seventh Day Adventists, had you received cargo from them on previous occasions? A. Yes. All of them were big shippers and supporters of the Line over the years, and still are as a matter of fact.

Q. Now, it appears by this due bill that was given by some of the shippers—Lutheran World Relief paid your first freight without any question, but the others gave you a due bill promising to pay within two or three days and also to pay the expenses of collecting. What was the expense that you incurred in collecting this first freight from these three shippers? A. It was something in excess of \$6,000. I think it was about \$6,200.

The Court: Would you clarify that a bit for me, Mr. Poor? I don't follow it.

Mr. Poor: Well, the substance of it is this: that it is the practice nowadays to pay the freight in advance. Of course, Mr. Van Emmerik tried to say that was extortion by the ship owner, but that isn't the point at all because if [54] the ship owner gets his freight in advance, he can make a lower freight rate. If he doesn't get paid until the end of the voyage, of course, why he has to charge something for the delay in payment.

The Court: The shippers here gave due bills.

Mr. Poor: Pardon me?

The Court: There were due bills involved here?

Mr. Poor: Yes, due bills were involved in three cases. The due bills provided—they are set out in

*Orestes P. Pendias—Direct*

paragraph 5 of the stipulation of facts, page 3, and they read: "Receipt is hereby acknowledge of prepaid, negotiable sets of Bills of Lading per"—and then you fill in the name of the ship—"numbered as follows without payment of freight, and in consideration of the acceptance by Orient Mid-East Lines of this Due Bill, it is herewith expressly agreed to pay ocean freight charges in U. S. Currency as undernoted within seventy-two hours after date, the vessel to have a lien on the cargo for full amount of ocean freight charges plus any expenses incidental to the collection thereof until payment has been effected."

Now, that freight was not paid until March of 1965, the exact dates of payment are shown and the plaintiff considers that it is entitled to interest for delayed payment [55] in an amount to be fixed by the Court, let us say 6 per cent, and in addition to the expenses of the collection.

Now, the expenses of collection: it became necessary for the plaintiff to employ law firms to take this matter up with the voluntary agencies and, through them, with the United States. The United States didn't intervene immediately but after a while, it did.

The Court: Well, these are legal expenses that you are talking about?

Mr. Poor: Legal expenses, yes. And Mr. Pendias has testified that the legal expenses amounted to \$6,000 and after the expenditure of these expenses and so forth, the amount of this first freight, which was a very considerable sum, was paid.

The Court: Very well.

*Orestes P. Pendas—Direct*

*By Mr. Poor:*

Q. Now, did the Olau Gorm arrive at the Seaway earlier than the date set in your telegram of November 25?

A. Yes. I believe she arrived one day earlier than we had stipulated in that telegram of November 25th.

Q. Now, you have testified that you telephoned the Seaway. Do you recall at any time the Seaway may have telephoned to you? [56] A. No, sir, never.

Q. Did you, while talking with Captain Butt or some other person in the Seaway, have what has been referred to as an "off the record" conversation? A. Yes, sir, I did.

Q. Did that conversation change your opinion in any way as to whether you could get through the Seaway on arriving at the dates fixed in the telegram of November 25?

A. No——

Mr. Van Emmerik: I object.

The Court: Could we fix with whom this conversation took place and when, Mr. Poor?

Mr. Poor: Yes. Mr. Pendas believes it was with Mr. Butt.

The Witness: Captain Butt.

The Court: What do you mean by an "off the record" conversation?

The Witness: Well, the purpose of my having called, Your Honor, was to see if I could get some additional time beyond that which we had given in our telegram, and he didn't think it was advisable to stay beyond those dates. Then I tried to press him for a definite closing date, so to speak, and, of course, I explained to him what our problem was, that [57] this meant leaving a certain amount of cargo behind. I said, "If we can stay, we would like to take

*Oréste P. Pendas—Cross*

the rest of the cargo but if we can't, we will just have to stay with the dates that we have given."

Well, this "off the record" conversation—by "off the record," I mean that it was something neither of us would quote again; it was something between he and I, not to be used possibly—In which way? It wouldn't be quoted again, so to speak, sir.

Mr. Poor: Mr. Pendas feels that as this was what he calls "off the record," that it wouldn't be proper to quote what was said. That's the point about it.

The Court: Well, if it is not quotable, is it usable?

Mr. Poor: Well, we think it is material but he doesn't feel, nevertheless, that it would be proper. He feels sentiments of——

The Court: Well, we have received the conversation but I think it's doubtful weight if it can't be quoted.

Mr. Poor: Well, the only reason that it can't be quoted is because he feels that Mr. Butt, in making these statements to him, it was with the understanding they would not be quoted.

[58] The Court: Well, go ahead.

Mr. Poor: You may cross-examine.

*Cross Examination by Mr. Van Emmerik:*

Q. Mr. Pendas, I think I understand but I would like you to clear it up a little bit: Should we understand when we talk about Eagle Ocean Transport or Orient Mid-East Lines, we are really talking about you? A. No. When you talk about Eagle Ocean Transport, you are talking about

*Orestes P. Pendias—Cross*

me. But since I am general manager for that line, you might say I am responsible for the actions of Eagle Ocean and Orient Mid-East Lines.

Q. And, specifically, you were responsible in December of 1964 for sailing the vessels, say, the Olau Gorm and Orient Merchant, I take it? A. I was to decide, yes.

Q. You made the decisions. A. That is correct.

Q. And when you made those decisions, I take it you made them from New York City? A. That's correct.

Q. Did you at any time visit the scene up in the Lakes?  
A. That particular year?

[59] Q. Yes, in December of 1964. A. No, I did not.

Q. Did you get in touch with anybody up there to ask—this is besides the Seaway people, Captain Butt who you say you spoke to on December 2nd. Did you get in touch with anybody else up there in an attempt to help you make this decision? A. No, I did not.

Q. You were aware that there were other vessels clearing in December, were you not? A. Yes, I was.

Q. And you could have obtained their names? A. I could have.

Q. And you could have found out the owners? A. I could have.

Q. And you could have, perhaps, consulted with the owners about why they were clearing ahead of you? A. I could have done a lot of things but it would have been rather unusual.

Q. In what way would it have been unusual? A. Well, I have never done this in preceding years and you simply don't call up other owners to find out exactly what they are doing unless you feel that there is an urgent [60] need to do so. But we had been up there since '59 and there was nothing unusual in what was going on that particular year



*Orestes P. Pendas—Cross*

any more than there was the preceding year when we sailed out of there the 10th. As a matter of fact, we sailed a ship on the 8th of December of last year. There is nothing unusual about that.

Q. What I am suggesting is that the reason you think there was nothing unusual is because you didn't obtain any information about the circumstances up there. A. I don't think that at all. I think it is unusual to call up another operator to find out—I don't know exactly what I would be expected to find out from another owner.

Q. You mean to say you were absolutely unconcerned that the 7th and 8th were good firm dates to get out of the Seaway? A. I was approached directly by the Seaway and I had given the Seaway the 7th and 8th dates. I relied on them a hundred per cent.

Q. Had you ever given the Seaway such dates before?

A. They had never asked for them before.

Q. You never gave them before? A. No.

[61] Q. Wasn't there something unusual about their asking you for them this time? A. I didn't think so at the time, no.

Q. Did you call up to find out why this departure after six seasons, I think it would be, of operations? It was the sixth season. A. No, it wouldn't really be six seasons. We are talking about what happened in '64 and we started operations in '59. We had one vessel in '59 and I think it left in mid year, so you really might say we commenced large scale operations in 1960. I suppose it's an operational change of the Seaway. They change from season to season. I didn't think there was anything extraordinary about it.

Q. The telegram started off, I think, "In the best interests of all concerned." Did you stop to inquire what those interests might be? A. No, I didn't.

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Q. Did you obtain any meteorological data, such as, long-range weather forecasts? A. No, I didn't do that.

Q. You were aware that such things are available through the Canadian government, weren't you? A. Yes, they are. There are a lot of things that are [62] available but in the normal course of operations, no carrier calls up meteorological stations on the 25th of November. I would think that the Seaway Authorities, which was right on the spot and conversant with all of these, probably would be the proper party to go to. I can't think of a finer source of information than the Seaway Authorities.

Q. Did you get the information you asked for? A. Well, I gave them the information they wanted and I would have assumed that if my dates were not good, they would have told me.

Q. You didn't make any other inquiry on your own? A. No, at the time, I didn't.

Q. Are you aware that the Seaway makes available certain data concerning water temperatures at various locks? A. Yes, I know that.

Q. Did you request this from them? A. No, I didn't.

Q. Did you ask them the circumstances and situation with respect to the formation of ice in the Seaway? A. No, because even if I would have asked for that information, Mr. Van Emmerik, I don't know that I could have used it in any way. I'm not an expert on ice and ice formation and how long the ice has to remain, or how the temperature [63] has to be for ice to become so thick that the ships can't proceed. I left it to the Authorities to let me know their opinion. They are the experts; they could let me know.

Q. After twenty-eight years in the shipping business, including three at sea, aren't you something of an expert in ship operations? A. Mr. Van Emmerik, I don't go around

*Orestes P. Pendias—Cross*

calling up a port of landing to find out what dock facilities they have; I just assume that when a ship is to go into a port that the depths are known over the area to be available. I don't go around checking them every time I send a ship in.

Q. I would be surprised if you did, too, but we are not talking about going into a channel which is presumably dredged to a certain depth or what the charts say; we are talking about coming up to the end of a navigation season which can close any time, any one of the first days of December. Did you make any effort on your own to find out which of those first days of December would be the magic day beyond which you could not exit? A. No. I expected that the Seaway would tell me that.

Q. Did you, in the course of making your decision, consider what the vessel called the Flying Independent was doing? [64] A. No, I wasn't interested in what the Flying Independent was doing.

Q. You have no idea what the Flying Independent was doing? A. I know what she was doing. I know she was in Kenosha. As a matter of fact, a port captain, an attendant serving Milwaukee was amazed when I told him I was sailing a ship on the 3rd of the month. He said to me that the Independent was staying in Kenosha until the 4th. Of course, I wanted to live up to the dates that I had given the Seaway and the only way to do that was to sail on the 3rd of the month, which I did.

Q. There was another vessel frozen-in. Were you aware of that? A. I only found out about that after the ship was frozen-in; that's the Van Fu.

Q. Did you know where she was? A. I had no idea.

Q. Just where the Flying Independent was? A. Well, she just happened to be mentioned to me by a port captain because she was in the adjacent port.

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Q. If you were made aware that your master, Captain Orfanos, of the Orient Merchant has already testified in this [65] case that a sharp watch was being kept on what movements the Flying Independent was going to make and you were intending to sail just ahead of her to get to the locks just ahead of the Flying Independent, would you change your story? A. No, I wouldn't.

Q. I realize that you don't agree that you were ever telephoned by the Seaway on December 1 but if a witness were to testify that you discussed the Flying Independent and the fact that she might clear as late as December 10 and had a guaranteed clearance date, would you change your statement that you just made? A. No, I would not.

Q. Now, should we take it—and I don't mean this in any derogatory way—that you meant what you said in that telegram of the 25th to the Seaway that you respectfully request to be advised or “request immediate advices event Authorities decide close Seaway sooner”? A. I certainly did. I didn't want to get frozen-in.

Q. I think we can take that for granted, Mr. Pendias.

Did it occur to you in writing this telegram that maybe the Seaway Authorities wouldn't know in the four days that it would take to get the Merchant from Milwaukee to the locks, wouldn't know more than four days before closing when they [66] would have to close? A. Well, I wouldn't be in a position to know exactly what they know, but it's generally understood that they get these seven-day forecasts, so they would probably have known. If it would say so many days hence, such and such is the temperature at such and such; and, therefore, when they say “short notice”, short notice is a matter of hours, say ten hours, if you are sitting in Toronto but short notice is about four days if you are sitting in Chicago or Milwaukee. So, I cer-

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tainly would have expected them to take that into account. They knew what dates I would be at those particular locks and I never heard from them. They never picked up the phone to tell me, Well, you had better get out sooner than you have given us in the telegram.

Q. Do you know anything about Seaway operations which constitutes them an adviser to you? A. No, but over the years that we have been up there, it seems that they are the ones that decide how late and when they shut this thing down.

Q. You spoke about a seven-day weather forecast. I take it you know about such a thing? A. I just heard that it's available to the Seaway and that the Seaway bases their decisions on such things, and I [67] only found that out last December.

Q. I take it you were the author of this telegram of the 25th to the Seaway, asking for their advices? A. I was.

Q. Let me get this clear: Were you not asking that you be advised so soon as they knew when they would have to close the Seaway? A. The telegram speaks for itself. I was asking them to tell me whether or not the 6th and 7th or 7th and 8th, whatever dates I mentioned in that telegram, were in their opinion safe dates to transit the Seaway.

Q. Right. And so soon as they know when they are going to have to close, your merely ask them to tell you immediately that they made up their minds; right? A. I don't know if I followed your question exactly, Mr. Van Emmerik.

Q. Well, maybe we had better leave it as is. You said the telegram speaks for itself. A. That is right.

Q. I just want to understand whether or not you mean that when you say it speaks for itself, it means only that so soon as they know when they are going to have to close

*Orestes P. Pendias—Cross*

that you be immediately informed? [68] A. No. The intent is that they let me know in time so I can get the ship out of port on a certain date, Mr. Van Emmerik——

Q. So, you want them to predict two dates: You want them to predict, one, when they think they are going to have to close and, two, when they are actually going to have to close. A. No. The only thing they have to do is tell me when to get out; and if they think that the 7th or the 8th is not safe date in time to get out, I expected them to tell me and I would have sailed the ship earlier.

Q. Why should they tell you? Why isn't that a decision you can make for yourself? A. Well, I am not the one to determine what the weather is. I am not an expert on the weather up at Cornwall and St. Lambert.

Q. Did you make any independent attempts other than this to obtain expert advice on this subject? A. Well, I can't think of a finer expert than the Seaway themselves.

Q. Did they ever hold themselves out to you as an expert? A. No, but it's generally understood that they are the [69] ones that get all this information and based on that information decide.

Q. By "generally understood," you mean understood by you? A. No, generally understood by all the operators on the Lakes.

Q. That's quite a generality. A. It is.

Q. Do you deny receiving any oral reply to the telegram? A. I do.

Q. Do you deny receiving any oral communication at all other than this telephone conversation you say you had on December 2 with Captain Butt? A. I do.

Q. Now, I believe you testified that your port captain—Is that Captain Goussetis? A. Goussetis, yes.

*Orestes P. Pendas—Cross*

Q. That he said he didn't think that you were going to get enough cargo into the Merchant—I take it he spoke only of the Merchant, is that correct? A. That's correct.

Q. That you weren't going to get enough cargo into the Merchant or get all the cargo into the Merchant that was [70] available for her in time to make the Seaway by these estimated or expected times of arrival, is that correct? A. That is right.

Q. Did he at that time discuss with you whether or not it would be advisable to leave even earlier? A. No. On the contrary, he was suggesting, as I recall, that perhaps what was the hurry in getting out, there were other ships in the Seaway. And I told him I wasn't interested in what other ships were doing, I wanted to meet that date of the 7th.

Q. There were other relief cargoes aboard those ships. Well, let's discuss only the Merchant now. The Merchant carried UNICEF cargo, too, did she not? A. Yes, she did.

Q. Most of the UNICEF cargo was milk for Djakarta, was it not? A. I believe so.

Mr. Van Emmerik: Your Honor, this UNICEF cargo is not involved in this case. UNICEF pays its own freight.

*By Mr. Van Emmerik:*

Q. Did you, towards the end of November, ask UNICEF to make more milk cargo for Djakarta available to you for loading? [71] A. Our traffic department may have asked them to give us as much cargo as it could. We were trying to complete a vessel. I didn't have any direct communication myself with UNICEF; that would have been our traffic department.

*Orestes P. Pendias—Cross*

Q. Do you know whether or not a Mr. Tad Adamowski for UNICEF confirmed that further arrangements for more milk for Djakarta after November 27th would be made available for lifting by the Orient Merchant? A. I don't know about after November 27th but I think we must have told them about the 27th that we were to take the cargo, because that was about the time we expected the ship to arrive at the loading port. I think it was Milwaukee or Chicago, one of the two.

Q. Milwaukee. A. Milwaukee.

Q. Is there any doubt in your mind that on or about the 27th of November, Orient Mid-East Lines was asking for more cargo? A. We may have been asking for more cargo. There would be nothing unusual about that.

Q. Could you have asked the other agencies here, CARE and the others, for more cargo? A. Probably we did.

[72] Q. How did you know after your ships were frozen out of the Seaway, how did you know the names of Captain Butt, Mr. Mackenzie, Mr. Burnside and others, to go through the Cornwall information service to get their home numbers? A. Well, I called the Cornwall number. That's available.

Q. You mean the Seaway number? A. The Seaway number, yes. And I asked for who was in charge there. I suppose it started out in that sort of a fashion.

Q. You didn't know their names, though, before you started? A. Well, I can't say I didn't know their names. I don't think I had ever spoken to any of them before, and to the best of my recollection I never spoke to any of them before.

Q. Do you recall an occasion when Agriculture Investigator Randall Brune conducted an investigation and inter-



*Orestes P. Pendas—Cross*

viewed you in connection with this event? A. I remember somebody coming up to see me, yes.

Q. Did you tell him that because of other commitments, let's say other ships to be operated by Orient Mid-East Lines, perhaps other ships under Eagle Ocean's agency, I don't know, [73] you were able to devote only a certain limited amount of time to looking after the Orient Merchant and the Olau Gorm in the Lakes? A. No, we only operate one line and that's the Orient Mid-East Lines.

Q. How much time did you devote to the affairs of those two vessels in the Lakes? A. I can't precisely tell you in hours or minutes.

Q. No, I meant roughly what percentage of your daily work day. A. I really don't know. I have never thought of it. I don't know what other ships we had elsewhere in the world. At the time, I guess we must have been operating ten or twelve vessels. I really don't know, because the Line does operate time chartered ships. I really don't know how many additional ships we had during that year.

Q. If I recall correctly, the stipulation in this case says that the Olau Gorm shut out 409 tons of cargo at Buffalo before she sailed. A. That's right.

Q. Do I understand correctly that this cargo was stored at Orient Mid-East Lines' expense over winter and picked up again in the spring before the Olau Gorm set out [74] for the Mediterranean? A. It was stored over the winter and I imagine it was at our expense, I can't really say, and I do believe it was picked up in the spring of the next year, yes.

Q. Now, when you stored this cargo in Buffalo, did you make commercial arrangements to store it? A. If I recall, the cargo was in the piers of our stevedores.

*Orestes P. Pendias—Cross*

Q. Pittston Stevedoring? A. I think Pittston Stevedoring, yes.

Q. And that would be at the Buffalo Municipal Pier, would it not? A. I believe so. I'm not sure of the name of the town.

Q. And the Buffalo Municipal Pier has a tariff, has it not? A. It probably does have, yes.

Q. Are you familiar with that pier? A. No, I'm not familiar with that pier.

Q. You spoke, I believe, of an extreme solution proposed by a tug firm called McAllister in New York to pull the two vessels through the Seaway locks with tug power; is that correct? [75] A. I mentioned something to that effect, yes.

Q. Do you really seriously think that plan would have worked? A. No.

Q. In fact, it's bad enough to get one ship in; it's even worse to get a ship and a tug through, isn't it? A. Well, the reason I say no, it isn't dependent upon the tug. I think the tug would have been capable of doing it but to get the ships through the locks meant the gates had to open up and I doubt it if the Seaway would have opened up their gates; not because of any other reason.

Q. Not because you didn't have sufficient power in the two ships or anything like that, the Gorm and the Merchant? A. That's right.

Q. Perhaps this is going over the same material twice and if so, excuse me. But did you, in telephoning Captain Butt on the 2nd of December, attempt to ascertain if the Seaway had available to you any hard information, any actual facts, any notices to mariners, any advices to navigation interests, or any such documentary matter available that would help you to make a decision on when to sail these

*Orestes P. Pendas—Cross*

ships? A. No. I didn't feel that I needed any such information. I relied entirely on that telegram. The only purpose of my [76] calling was to see if I could have a date even beyond that telegram for the Orient Merchant.

Q. You say you relied entirely on the telegram. A. That's right.

Q. You, then, were going to make your decision entirely against the background of what the Seaway Authorities said in reply to your telegram, is that correct? A. I would have decided to sail that vessel when I was told that the Seaway was to close on a specific date, I would figure out the distance I had to travel and the days I needed, and I would have sailed the vessel accordingly.

Q. But this assumes, doesn't it, that the Seaway knows the exact date when it is going to close? A. Well, I assumed that the Seaway has a good idea, yes.

Q. This is another assumption of yours. A. Well, they are the ones that set the dates right along, there is nothing I can do but to assume that. They have set the dates right along, up until last year.

Q. Set what dates? A. The closing of the Seaway.

Q. Do you mean the official or the actual closing dates? [77] A. Presumably, the actual closing.

Q. Again, we are talking about presumptions. I thought you testified that up until now, the Seaway never set any closing dates, that the Seaway closed only after the last vessel got through. A. No. Well, the Seaway, up until that particular year, had never locked a vessel in. As a matter of fact, after the last vessel sailed out of the Lakes, the last ocean-going vessel, they never closed the Seaway down as such. They were open. There was just no traffic because there were no vessels there. In that particular year—

*Orestes P. Pendas—Cross*

Q. Excuse me. Are you talking about ocean vessels?  
A. Ocean-going vessels, yes.

Q. You are not talking about inland vessels now? A.  
No.

Q. Go ahead. A. The particular year that we were  
locked in, they gave notice but the type of notice they gave  
was, by their own admission, only a ten-hour notice.  
And——

Q. Excuse me. I have got to track you here. What  
do you mean "by their own admission, only a ten-hour  
notice"? A. Well, when I spoke with Captain Butt, he  
said, "We gave notices at two o'clock on the 5th"—This  
was in that [78] conversation I had with him probably on  
that Sunday, saying that they gave the first notice out at  
2 P.M. of the 5th. I said, "Announcing what?" He said,  
"The closing of the Seaway at midnight." Well, that's  
only ten hours.

Q. You are talking to Captain Butt now? A. I believe  
it was Captain Butt, yes. To the best of my recollection,  
it was Captain Butt.

Q. Doesn't this suggest to you that if that's the best  
the Seaway can do, then your telegram was misdirected?  
A. Well, that was water under the dam. I mean, it was  
misdirected. And if that's the best they could do, I only  
found that out that year.

Q. Did you tell Captain Butt on the 2nd that what you  
really wanted was to have a prediction made not only as  
to when they might close the Seaway and when they might  
decide to do so, but how much lag time you should be al-  
lowed to get your ship four days away to the Seaway?  
A. No, I knew how many days I needed. I calculated the  
distance and the speed, which I did, and that's why I sailed  
the ship on the 3rd.

*Orestes P. Pendas—Cross*

Q. You mean, you didn't know when you called him how long it would take to get the Merchant to the Seaway?

A. I knew how long it would take, that's why I sailed [79] on the 3rd. That's what I'm saying.

Q. Now, I believe you testified that you considered that you had a fair chance to get the two ships through the Seaway if you had just been given the opportunity to absorb all the expenses of going through. A. Well, at least on the Olau Gorm, I really felt that I had a very good chance of getting through.

Q. Why? Because she is smaller, is that it? A. Well, no. She was a lot earlier. You see when she sailed, the pilot that boarded her told them that the Seaway was closed. And if you look at his logs, he sort of dawdled going to Prescott, which is the point off Iroquois where they pick up pilots. He wasn't sailing full steam there. He was just idling along.

Q. How long do the logs show that he was idling along?

A. Oh, I don't recall now. I do recall seeing that notation in the logs. In any case, there certainly must have been several hours involved.

Q. He didn't make all speeds to the locks, did he? A. No, he didn't.

Q. Did you instruct him to? A. Well, no. There was no point of his doing it. [80] When he started out, he sailed at midnight the 5th and, as I recall, the pilot that boarded her told him that the Seaway was closed. Well, he would be racing to a Seaway for what purpose? And he was, apparently, waiting for further instructions. I might have told him to turn around and go back or go elsewhere. He was waiting to hear from us.

Q. The fact remains that he arrived off Prescott at 1310. I believe that is the correct stipulated time. A. It arrived at 1310, yes. That was the 7th.

*Orestes P. Pendas—Cross*

Q. And the Merchant arrived at 1347, right? A. That is right.

Q. They both arrived at the same time. Why, on that basis, could the Gorm get through more easily than the Orient Merchant? A. Well, she could have been there even before the Orient Merchant. I don't think the Orient Merchant slowed down. I don't recall that she did. But at the time that I was making this plea to the Seaway Authorities on Sunday whom I called, I told them that the vessel had sailed at midnight of the 5th and to please let the vessel get into the locks and try to get down.

Q. Was this plea based on the fact that she left so early? [81] A. Well, I figured she would be there within a reasonable time, I mean. It isn't that far from Buffalo, too.

Q. No, it's not that far. She made it in thirty-eight hours. A. Well, she made it in thirty-eight hours. She might have been able to do it in perhaps thirty-five hours. But the point was it didn't really make very much difference when she arrived, she would have been the first one there. And I just wanted them to let the ships try to go through. I didn't see that there was any rush for the Seaway. We were paying for the fuel of the ships, the time of the ships and all I wanted was to be given the opportunity to try. If I didn't make it, well——

Q. And if in going through, you tore out a lock gate or if you unhinged one of them, would you indemnify the Canadian government for this? A. I don't think the Canadian government would let us go through if we were to tear out lock gates. They were letting other ships go through and I was hoping we would be able to catch up with the last ship going through. I think it was a ship called the Jean Lafitte. I thought we might have had an opportunity to catch up with that convoy going through.

*Orestes P. Pendias—Cross*

[82] Q. Were you aware at that time, when you thought this, that the convoy had already exited at the other end before your ships ever got there? A. No. As a matter of fact, they had not exited because I was talking to them on the 6th and they were saying they expected the last ship to clear there, as I recall, at seven or eight that evening of the 6th, and——

Q. Who are "they" that you spoke to? A. When I say "they," I mean Captain Butt or—I guess it was Captain Butt.

And as it turned out, the vessels that did clear didn't clear through until the next morning at seven o'clock. I am not saying we could have caught the convoy; the only thing is we were never given the opportunity to even try.

Q. Do you know whether or not that at eight o'clock—and this is the fact that there was an upbound ship that got through at eight o'clock p.m. on the 6th—Do you know whether or not you could have been there at eight and, if so, you could have gotten through? When I say "you," let me explain I mean the Olau Gorm. A. At eight p.m. on what day?

Q. The 6th. A. No, I couldn't have made it at eight p.m. on the [83] 6th. I only arrived at the other end ten hours about— well, you mentioned the time, about 1300 hours, I guess.

Q. Yes. That's at the Seaway pilot station at PRESCOTT.

A. That's right.

Q. It would take a while to get into the Seaway, would it not? A. It would take an hour or so.

Q. And it takes about a day to transit the Seaway even under the best conditions, right? A. No, it doesn't take a day under the best conditions.

*Orestes P. Pendas—Cross*

Q. Well, the stipulated fact in this case is that it does.  
A. Well, that's the average but I presume that if there's no other traffic in the Seaway, you could move an awful lot faster. I think the stipulated time is based on the average; it's the norm when there is other traffic. But if we would have been the only ship in the Seaway, I guess we could have gotten out a bit quicker.

Q. Unless you hit fog or ice, or something. A. Well, of course, those are things we don't know.

Q. But if you got into the Seaway, say, at two p.m. on the 6th, could you have made it to the other end by eight [84] o'clock on the 6th? A. No, I might have been there perhaps later that same day. But who is to say that eight p.m. would be the finale?

Q. What I am getting at is you're not to say because you didn't go up there and look at the lock, did you? A. Well, no but if you don't try, you never know.

Q. But on the other hand, if somebody who is responsible for the lock says he is not going to let you do it, you are not going to second guess him, are you? A. I have no argument with them, Mr. Van Emmerik; I am just stating here what we tried to do. Now, whether the Seaway thought it was prudent to let me try or not is another matter.

Q. You had an agent in the Lakes called Hurum Shipping, did you not? A. In Montreal.

Q. In Montreal. Do you know whether or not they are a member of the Shipping Federation of Canada? A. I believe that they are.

Q. Did you—and I take it you did not but I am asking this for the record—Did you at any time before December 2nd telephone the Seaway to call their attention to your [85] telegram and to explain what you really meant by this



*Orestes P. Pendas—Cross*

term that speaks for itself? A. No, I don't recall that we ever did, sir.

Q. Did you at any time ask your shippers, CARE, Church World Service, Lutheran World Relief, or the Seventh Day Adventists if they had any misgivings about your continuing to load cargo? A. No, I didn't specifically call them but I am sure that they were aware of the fact that——

Q. All right. I don't want you to assume what they might have been aware of. You did not let them share in your gamble, did you? I withdraw that.

You did not let them share in your decision, did you? A. No, I did not. I did let them know of it.

Q. To sum up, then, you relied entirely on the Seaway Authority and entirely on this telegram and entirely on whether or not the Seaway would answer this telegram in time for you to sail your ships for the purpose of making your decision about when to get to the Seaway to clear, is that correct? A. That is right. On that and my previous experience, since they had cleared vessels as late as those dates and even later.

Q. In other years? [86] A. In other years, yes.

Q. Now, it is stipulated in the record that you had certain vessels leave on other dates, and I am referring to Amendment No. 2 to the pretrial stipulation. There are seven ships of yours—you, Orient Mid-East Lines—which cleared the Seaway in the month of December in previous years.

Now, as I read that list, four or the majority of them cleared on or before December 5th. Is that correct? A. That is right.

The Court: What is your reference to the stipulation?

*Orestes P. Pendas—Cross*

Mr. Van Emmerik: This is Amendment No. 2, Your Honor.

Mr. Poor: Amendment No. 1, I believe it is.

Mr. Van Emmerik: That is correct. Amendment No. 2 has to do with cargo dates.

It is Amendment No. 1, Your Honor.

*By Mr. Van Emmerik:*

Q. Now, a fifth one cleared on December 6th, is that not correct? A. That is right.

Q. Now, when we say "clear," that means gets out at the St. Lambert end, is that correct? A. That is right.

[87] Q. This leaves only two of them on or after December 7th, one on the 7th in 1963 and one on the 10th in 1963; is that correct? A. That is right.

Q. So the sum of your experience really is that, at least, you sailed your vessels on or before December 6th in the considerable majority of cases, is that correct? A. Well, it isn't based solely on that. It isn't only what our vessels do. The Seaway was open and other vessels transited beyond those dates.

Q. We will take them up next. I am asking you about your vessels now. A. Would you repeat that question, please?

Q. Certainly. We have seven vessels which you have specified—you may not be aware of it but this stipulation was entered into at the request of your counsel, Orient Mid-East Lines' counsel, and it is shown that you have had experience in prior years in sailing at least seven vessels out of the Lakes on or after December 1 of each year. A. That is right.

Q. This is before 1964. Yet, your experience has been that in five of those seven cases, you sailed on or before

*Orestes P. Pendas—Cross*

December 6th and in only two cases did you sail on or after [88] December 7th, which was your expected time of arrival. A. Well, that isn't the only experience we have. We know, for example, that previously in some of those years the Seaway didn't close until perhaps close to Christmas-time.

Q. Well, how do you know this? Did you sail any ships out of there? A. No, but we know, for example, that in 1965——

Q. Let's forget about 1965. You couldn't have based your experience in 1964 on what happened in 1965. Let's talk about the years 1964 and prior. A. Well, as I recall, I had information to the effect that the Seaway was open considerably later than the passing of the last vessel.

Q. Did you get this information from the Seaway Authorities? A. No, I didn't get it from the Seaway Authorities. It might have been in the papers.

Q. It might have been scuttlebutt, mightn't it? A. Well, of course, it could have been.

Q. All right. Now, let's talk about these other ships: Did you ever trouble to learn what times or dates ocean vessels had cleared the Seaway on other dates; other ocean vessels, what time the last ocean vessel went downbound? [89] A. Well, no, I didn't bother. Perhaps I might have looked at it out of curiosity, I don't recall.

Q. Where would you have found that information? A. I really don't know where I would have seen it. It might have been in the Journal of Commerce, perhaps.

Q. Now, that brings up the Journal of Commerce. Do you read it very much? A. I don't read it; I occasionally glance at it, yes.

Q. It's an important commercial journal in New York, isn't it? A. It is, yes.

*Orestes P. Pendias—Cross*

Q. Did you, perhaps, read it a little more closely with the impending closure of the Seaway in mind in November 1964? A. No.

Q. Did you ever see this article in the Journal of Commerce, dated Monday, November 30, 1964? It starts off with the headline, "Day-to-day schedule set, Seaway closing record season." Did you read that article? A. I don't recall if I read it, no.

Mr. Poor: Could you furnish us a copy of that, please?

Mr. Van Emmerik: Indeed.

[90] Excuse me, Your Honor. Excuse me, Mr. Pendias.

(Document was handed to opposing counsel.)

*By Mr. Van Emmerik:*

Q. You never saw that article before? A. I don't recall this, Mr. Van Emmerik. No.

Q. If you had seen it, might you have made a different evaluation of your chances of getting out?

Read the first two or three paragraphs, if you please. A. (Perusing document) I have read the first two. I don't know that it necessarily would have changed my opinion. They are quoting here something that's told them by the St. Lawrence Seaway Authorities, which is the very same people to whom I sent my telegram. They are just getting information from the same source that I applied to.

Q. This Journal of Commerce is a journal directed to the shipping world, isn't it? A. It is a shipping journal, yes.

Q. And you are part of the shipping world, aren't you? A. That is right.

*Orestes P. Pendias—Cross*

Q. This might be their way of getting in touch with you; did you ever think of that? A. No, I don't think so. Instead of sending the telegram on the 25th, why didn't they put something in the [91] Journal of Commerce? I don't think so, no.

Q. The question is equally answerable by, why should they single you out for special attention? A. I don't know, but they did.

Q. When? A. On the 25th of November.

Q. Who signed the pre-clearance form, Mr. Pendias, for the Orient Merchant and Olau Gorm? A. I don't know who signed the pre-clearance forms.

Q. It is part of the deposition of your master that the representative named on the face of it is Eagle Ocean Transport. A. Right.

Q. You didn't know this? A. Well, I am not familiar with all the details. Those particular details, I don't go into.

Q. You didn't know that the Seaway would try to get in touch with the representative named on the face of the pre-clearance form? A. I assume that they would. I didn't stop to give that much thought, that's what I meant. There are a lot of phases of the operation that I can't have firsthand knowledge of.

[92] Q. You had traded in there for six seasons, including the first in 1959 tryout season? A. That is right.

Q. Didn't you in that time ever become familiar with the operations of the very agency that got you from the ocean into the Lakes, namely, the Seaway Authorities? A. No, I don't handle that particular phase of it.

Q. You handled the decision-making phase, don't you? A. That is right.

*Orestes P. Pendas—Cross*

Mr. Van Emmerik: Excuse me, Your Honor.

(Short pause in proceedings.)

The Court: Mr. Van Emmerik, are you going to be much longer with this witness?

Mr. Van Emmerik: Three minutes or five minutes at the most, Your Honor.

The Court: Very well.

*By Mr. Van Emmerik:*

Q. Mr. Pendas, I invite your attention to Exhibit "C" attached to the pretrial stipulation. There are two pages to Exhibit "C". They are xeroxed copies and I apologize for some ineligibility in them. These are ads in the Journal of Commerce for sailings of your two ships here, the Gorm and the Merchant, out of the Lakes. [93] A. Yes.

Q. Do you recognize these ads? A. Yes, I do.

Q. Do you have any doubt that they are authentic? A. They are authentic copies of the ads, yes.

Q. Now, they show the Merchant with an early arrival in the Lakes of November 12, don't they? A. Yes.

Q. The first loading port on the 12th, right? A. Yes.

Q. I am referring to Exhibit "C", page 1. That is the entry for Friday, November 6 (indicating)? A. That is right.

Q. Tuesday, November 10, she has been set ahead, hasn't she? A. She has, yes.

Q. Does this mean that you originally intended to get the Merchant into the Lakes earlier that year? A. Well, it would seem so.

Q. Was this cargo that was eventually lifted by the Merchant intended for another ship of yours? A. It might have been.

*Orestes P. Pendias—Cross*

Q. The Angeliki or—— [94] A. Possibly, yes.

Q. Can you tell us why the Angeliki didn't lift this cargo? A. Well, actually cargo for the Angeliki didn't amount to very much and the cargo for the Orient Merchant was, perhaps, considerably more and it was thought advisable to put both lots on one vessel rather than to send two ships partly loaded.

Q. Just for the record, does Exhibit "C", page 2 appear authentic to you? A. Is it from the same exhibit?

Q. Yes. The first one is Exhibit "C", page 1. A. Yes, they both look authentic to me.

Mr. Van Emmerik: No further cross-examination, Your Honor.

The Court: Is there any redirect, Mr. Poor?

Mr. Poor: Could I postpone it until tomorrow morning, Your Honor?

The Court: Yes. I would prefer if you would.

We will adjourn for the evening and reconvene at ten o'clock in the morning.

(Whereupon, at 4:25 p.m., the trial in the above matter was adjourned until 10:00 a.m., April 19, 1967.)

## [98] PROCEEDINGS

The Court: Good morning, gentlemen.

... Good morning, Your Honor ...

The Court: Are you going to have any redirect, Mr. Poor?

Mr. Poor: Yes, Your Honor. Mr. Van Emmerik has a couple more questions on cross-examination and I am glad to have him go ahead.

Whereupon,

*Orestes P. Pendias—Redirect*

ORESTES P. PENDIAS the witness on the stand at adjournment, resumed the witness stand, was examined and testified further as follows:

*Cross Examination by Mr. Van Emmerik (Resumed):*

Q. Mr. Pendias, you testified yesterday that you spent some \$6200 in legal fees in order to collect the first freights.

A. That is right.

Q. Were these legal fees incurred in connection with this agreement of March 3, 1965 that we have been speaking of? A. Yes, I suppose that they were.

Q. Did you actually pay that amount of money, something [99] totalling \$6200? A. I am sure we have.

Q. Do you have checks or other evidence of payment of that amount of money? A. I believe we do have.

Q. Are they in your custody? A. I suppose that they would be in the custody of our office in New York or the owner's London office, but I am sure they are available.

Mr. Van Emmerik: Thank you.

No further questions, Your Honor.

*Redirect Examination by Mr. Poor:*

Q. Mr. Pendias, you were asked yesterday about the engagement of cargo by UNICEF. Will you please tell us what UNICEF is? A. UNICEF, as I understand it, is another one of these volunteer agencies, United Nations Children's Fund, or some such name as that. They are a relief agency that ships goods abroad.

Q. Is this a letter which you received from UNICEF, dated November 11th, referring to the engagement of that [100] cargo? A. Yes, sir, it is.



*Orestes P. Pendias—Redirect*

Q. What does it say? A. It's addressed to Orient Mid-East Lines, care of Eagle Ocean Transport, Inc., in New York, attention Mr. Mulara. He was assistant traffic manager.

It says. "Gentlemen,

"For good order's sake, we confirm yesterday's telephone conversation, when you committed yourself to acceptance of cargo on 27 November in Milwaukee, and requested as much additional milk as possible for Djakarta.

"We were able to order out for that date a further quantity of 400,000 pounds net—about 182 tons gross."

Signed, "Tad Adamowski, Chief, Shipping Section."

Q. Is UNICEF an experienced shipper of cargo? A. Yes, sir, it is.

Mr. Van Emmerik: I object, I don't believe this witness is competent to testify as to UNICEF's experience.

The Court: Well, go ahead. There is no jury here.

*By Mr. Poor:*

Q. Answer the question. [101] A. Yes, sir, they are.

The Court: I think we can all take judicial notice of what UNICEF is and how it ships all over the world, anyway.

Mr. Poor: I will ask that this letter dated November 11th be marked as Plaintiff's Exhibit 1.

The Court: Is there any objection?

*Orestes P. Pendas—Redirect*

Mr. Van Emmerik: I don't believe so, if I could just see it.

The Court: It has been read into the record anyway without objection.

(Document was shown to opposing counsel.)

Mr. Van Emmerik: No objection at all.

The Deputy Clerk: Plaintiff's Exhibit No. 1 in evidence.

(Letter was marked Plaintiff's Exhibit No. 1 and received into evidence.)

*By Mr. Poor:*

Q. Now, at that time did you have in effect any insurance to cover Orient Mid-East Lines for the cost of railing cargoes to seacoast ports in the event that you were not able to take them on board the Orient Merchant or the [102] Olau Gorm because of the closing of the Seaway? A. Yes, sir, we did have such insurance.

Q. Is this the policy covering the Orient Merchant? A. Yes, sir, it is.

Q. And is this the policy covering the Olau Gorm? A. Yes, it is.

The Court: What policies are these? I don't understand.

The Witness: These, Your Honor, are insurance policies that the Line had taken out to cover the possible expense of having to rail cargo from an inland point to a seaport in the event we were unable to load it at the Great Lakes.

*Orèstès P. Pendas—Redirect*

*By Mr. Poor:*

Q. Did you make any claim on the Orient Merchant policy? A. Yes, sir, we did. We claimed the entire amount and collected it.

Q. And that claim was based on the cost of railing the shut out cargo to a port on the U. S. coast? A. That is right, sir.

Q. And the railing cost was in the neighborhood of \$55,000? [103] A. That is right, sir.

Q. Now, did you make any claim on the Olau Gorm policy? A. No, we didn't because we did not rail any of the Gorm cargo.

Q. Are you sure you claimed as much as \$55,000 on the Orient Merchant? A. I am reasonably sure, sir.

Q. But you might be a little high on that, I suppose?

Mr. Van Emmerik: I object to his cross-examining his own witness, Your Honor.

The Court: Did you collect anything?

The Witness: Yes, sir, we did.

The Court: Or did you just put in a claim?

The Witness: No, we collected against the insurance, Your Honor.

*By Mr. Poor:*

Q. Now, in view of those policies, what did the Orient Mid-East Lines stand to gain or to lose in the event that the ship remained at Milwaukee and/or Buffalo and missed the Seaway being open? A. Mr. Poor, even without the policies there was no point in keeping the ships within the Lakes if there was any [104] chance of their being frozen-in. The losses that the Line would have sustained and did sustain by being frozen-in were so tremendously high—

*Orestes P. Pendias—Redirect*

they run to thousands of dollars a day—as against the possibility of picking up a few thousands of freight.

Aside from that, had we been told to get out because of the closing of the Seaway, all we had to do was order the vessel out. We would not have lost the cargo, we would have simply railed it to the seaport and loaded it on the same ship and gone.

Mr. Van Emmerik: I move to strike the answer. It's not responsive to the question. I'm not even sure the question is a proper one; but the answer was directed to what would happen even if they didn't have the policy.

The Court: I think the question and answer are highly speculative. But, again, as I say, we don't have a jury so I will just give it the weight that I think it is entitled to.

Mr. Poor: I will ask that the policy on the Orient Merchant be marked as Plaintiff's Exhibit 2 and the policy on the Olau Gorm be marked as Plaintiff's Exhibit 3.

Mr. Van Emmerik: I do not object as to Exhibit 2 because there is testimony it has been cashed in. I do object [105] as to Exhibit 3 because it was never brought into play in the case. No claim was ever made on it.

The Court: No, but it has some connection with the precautions they have taken on a possible freeze-up.

I will permit it.

Mr. Van Emmerik: Yes, sir.

The Deputy Clerk: Plaintiff's Exhibits 2 and 3 marked in evidence.

*Orestes P. Pendas—Redirect*

(Insurance policies were marked Plaintiff's Exhibits 2 and 3 and were received into evidence.)

*By Mr. Poor:*

Q. Have you calculated how many long tons of cargo belonging to the three volunteer agencies—four volunteer agencies, I should say, CARE, Seventh Day Adventist, Church World Service and Lutheran World Relief, were on board the Orient Merchant when she sailed from Milwaukee on December 3, 1964? A. There were about 3300 long tons of cargo on board.

Q. How many long tons of cargo did the Gorm deliver at destination? A. The Gorm?

Q. The Gorm, yes. [106] A. The Gorm delivered something in excess of 5100 long tons.

Q. Why did you sail the Gorm from Buffalo on December 5 with the result that she arrived about a day later at the Seaway, leaving behind 400 tons of cargo? A. Well, the vessel had 400 tons more to go and although we could have loaded it the following day and still made the deadline in our telegram to the Seaway on November 25th, the forecast for the following day was snow and we didn't think it was economically reasonable to keep the vessel in port another day to load 400 tons when in all probability we would have to pay a setback to the gangs.

Q. I will show you Exhibit "C" which is one of the exhibits attached to the stipulation of facts. It is in two pages and it contains the Orient Mid-East Lines advertisements which were published in the Journal of Commerce. There are four advertisements and the publication dates are November 6, 1964, and November 10, 1964, and December 4, 1964.

*Orestes P. Pendias—Redirect*

Now, I call your particular attention to the advertisement of November 10, 1964, and I will ask you as to the Orient Merchant what date that shows for Chicago, Milwaukee, Detroit and Montreal? A. Chicago shows November 26; and—I can't read this—[107] it looks like Milwaukee is the 29th; and Detroit is the 30th of November; and Montreal, December the 5th.

Q. The Orient Merchant never in fact did call at Detroit, did she? A. No, sir, she did not.

Q. Do you remember why she didn't? A. Well, she didn't have the time to stop off at Detroit.

Q. Now, could a vessel calling at Detroit on November 29th have reached the entrance to the Seaway by November 30th? A. No, sir.

Q. And if the vessel was scheduled to arrive at Montreal on December 5th, what day would that mean that she would have arrived at the entrance of the Seaway? A. It probably would have been the 4th of the month.

Q. The 4th of December? A. That is right, sir.

Q. Now, on the Orient Merchant advertisement Friday, December 4, that apparently shows Detroit, November 30th and Montreal, December 6th. A. That is right, sir.

Q. And that would mean that as of that date, there was a schedule arrival at the Seaway of about December 5th? [108] A. That is right, sir.

Q. Now, I will ask you to turn to the Olau Gorm advertisements which are the next page, and the advertisement of November 10 shows an arrival of the Olau Gorm at Montreal on December 6, is that right? A. That is correct.

Q. And arrival at Buffalo on December 2. A. That is right.

*Orèstes P. Pendas—Redirect*

Q. When I say "arrival," that means not necessarily the day of arrival but she will be there; is that right? A. That is right.

Q. And the advertisement of December 4 for the Olau Gorm also shows Buffalo, December 2 and Montreal, December 6. A. That is right.

Q. I think that the Journal of Commerce was described yesterday as the bible of the shipping industry or some such word, and were these advertisements notice to the public and to any persons interested in shipping out of the Great Lakes that these two ships would not arrive at the entrance to the Seaway on November 30th? A. That is correct, sir.

Q. Now, counsel for the defendants here asked you questions about your telephone conversation with the Seaway [109] on December 2, 1964, and I am going to ask you a further question on that subject:

When you discussed the subject to the arrival at the Seaway of the Orient Merchant and Olau Gorm on that date, were you told by the gentleman with whom you had this discussion to get the Orient Merchant and Olau Gorm out of the Seaway without delay? A. No, sir, I was not.

The Court: Could you fix with whom he was talking and get some identification of this conversation?

Mr. Poor: The three witnesses from the Seaway are here and I believe we will be able to get an identification when they testify.

*By Mr. Poor:*

Q. Mr. Pendas, will you tell us what happened when you called the Seaway? A. Yes. In answer to your question, I was not told to get out immediately and, as a matter of fact, I was assured that the dates we had given in our telegram

*Orestes P. Pendas—Recross*

were all right, but they didn't recommend that we go beyond those dates.

Q. Yes. But when you first called the Seaway, you asked to speak to somebody? [110] A. Well, I believe I asked for and did speak to Captain Butt.

Q. You think you asked for Captain Butt yourself?  
A. That is right, sir.

The Court: What date was this?

The Witness: December the 2nd, Your Honor.

Mr. Poor: I have no further redirect, Your Honor.

The Court: Is there any recross?

Mr. Van Emmerik: Yes, Your Honor.

*Recross Examination by Mr. Van Emmerik:*

Q. In respect to these two insurance policies, Mr. Pendas, you testified that on the Orient Merchant policy, you collected all or nearly all its face value of \$55,000 to rail 2200 tons of cargo to the coast; is that not correct?  
A. That is correct.

Q. The coast in this case being Norfolk, right? A. Right.

Q. Where it was loaded into the Orient Trader, I think.  
A. I believe it was.

Q. Now, there is on the face of that policy in addition to its face amount of \$55,000, a thing called "Rate: 3 per cent." Does that have any application to increased coverage?  
[111] A. Rate 3 per cent?

Q. Yes. Would you like to see it? A. Yes.

Q. I am handing you both of them although I am asking about the Orient Merchant only. You will notice on the top line right next to the name of the vessel, it has the rate 3 per cent. Does that have any application to the



*Orestes P. Pendas—Recross*

coverage? A. I really don't know. It might have but to say for certain, I don't know.

Q. So for purposes of this lawsuit, \$58,000 on the Gorm and \$55,000 on the Merchant represents full coverage, correct? A. Full coverage.

Q. Now, you testified that you collected full coverage to rail 2200 tons, roughly. It was 1600 and some tons from Milwaukee, if I recall correctly, and 600 and some tons from Chicago. Let's say 2300 tons. A. Yes.

Q. This means, then, that your insurance was all used up, wasn't it? You had no insurance for anything loaded into the Merchant before shutting out those two blocks of cargo, correct? [112] A. Would you repeat that question for me, please?

Q. Yes, certainly.

In order to rail 2300 tons to the coast, you collected the full face value of the policy, \$55,000. Now, I think this means—I am just asking your confirmation—that had you shut out more cargo, you would be uncovered so far as insurance goes. A. That is possible. Now, I mentioned we collect the full amount of \$55,000. I am not so certain that we collected the entire amount, it might have been \$35,000 or \$40,000. I don't have the exact figures. If it was only \$40,000——

Q. We don't want any ifs, please we just want to know the——

Mr. Poor: Let the witness answer the question, please.

Mr. Van Emmerik: I will let the witness answer on facts but not on ifs, Your Honor.

The Court : Go ahead. I would like to get this clarified too.

*Orestes P. Pendas—Recross*

*By Mr. Van Emmerik:*

Q. The Judge has given you permission to continue with that answer. [113] A. Yes, I believe that we probably collected about \$40,000 against the maximum of \$55,000 of that policy. So, therefore, I would have been able to collect the balance of that policy on any other cargo I had railed in.

Q. Do you have a copy of the claim or do you have any copies of the checks the insurance company might have paid you under this policy? A. Not with me, but they can be obtained.

Q. Do you know how much you collected right now, so I can continue examining you on this point? A. At this very moment, I don't but I could find out for you if given permission time to call New York.

Q. Do you know how much cargo the Merchant loaded between, say, November 30 and December 3 in long tons? A. No, I don't remember the exact figures.

Q. She started loading on the 27th, did she not, of November? A. That is right.

Q. Would it be fair to estimate that between November 30th and December 3rd, she loaded about half of what she loaded between November 27th and December 3rd? A. The vessel was loading an average of about a thousand [114] tons a day, so I suppose that might be a fair estimate.

Q. If she was loading a thousand tons a day, she had November 27th, 28th, 29th,—4 days—December 1, 2 and 3—7 days. She should have gotten 7,000 tons into her but she only got 3300 tons in. A. She got 3300 tons of your particular cargo but she was also loading UNICEF cargo and she wasn't loading on every one of those days. There were days, depending on weather conditions, when the vessel wasn't loading.

*Orestes P. Pendas—Recross*

Q. I take it, then, that 3300 tons is just cargo belonging to the four volunteer agencies who are defendants in this case? A. That is right.

Q. How much additional tonnage was UNICEF cargo, if you know? A. There was approximately 2,000 tons.

The Court: Do you want those insurance figures produced? We could have him call New York.

Mr. Van Emmerik: I think it is incumbent upon the plaintiff to do so. I am making no demand. If they are going to come forward with their proof, fine, but I am not going to prompt them, Your Honor, in making their own case out.

[115] I might state for the record, Your Honor, I don't think a call to New York would do.

The Court: It would have to be by stipulation, I am sure.

Mr. Van Emmerik: Yes, sir.

The Court: It wouldn't be proper evidence otherwise.

Mr. Van Emmerik: I just didn't want it thought that by letting it go, I was agreeing to doing any such thing.

*By Mr. Van Emmerik:*

Q. Can you tell us why you did not rail the Gorm's 409 shut out tons to Norfolk? A. The vessel that loaded at Norfolk was going to the Far East.

Q. Yes. I'm sorry. I should have known that.

You had no vessel on the coast that was heading for the Mediterranean? A. At that time, no.

Q. With respect to this UNICEF letter which is now in evidence as Plaintiff's Exhibit 1, you testified yesterday

*Orestes P. Pendas—Recross*

that you were reasonably sure that on about and possibly after November 27th, you were still accepting additional cargo from UNICEF and even possibly from the defendants in this case. Is that still your feeling? [116] A. When you say "accepting additional cargo," we were accepting delivery of the cargo that we had booked.

Q. Were you asking for more? A. After the 27th?

Q. Yes. A. No. In reading that letter—that letter, as I recall it, is dated November the 11th and in that letter, they confirm the conversation with our office.

Q. We know what the letter says. I am asking you about what you said yesterday and if I think I recall your conversation correctly, it was that your traffic department was asking for additional cargo on or after November 27th. Those goods were already scheduled to arrive on November 27th. A. You mean beyond those cargoes?

Q. Yes. A. We might have been. It's not unusual to ask for additional cargo.

Q. All right. That's fine.

Now, you just testified a few minutes ago that when you telephoned on December 2, you asked to speak to Captain Butt; however, yesterday you testified that you didn't know the name of anybody up there and in order to get the name of [117] people to call on the 6th, you went through the Seaway Authorities' switchboard. How did you know to ask for Captain Butt on December 2nd if you didn't know to ask for him on December 6th? A. I didn't say I didn't know to ask for him on December 6th; I was trying to get their home numbers.

Q. Well, if I recall your testimony correctly, you said you didn't know any names to ask for and you just started at the switchboard and asked for people by their job design-

*Orestes P. Pendas—Recross*

nations. A. Well, I called the Seaway on the 6th to see who might have been there who could help me get this information and I think I spoke first with a dispatcher who said to call Captain Butt or call Mr. McKenzie, or call Mr. Burnside—I forget who—and finally, I was given home numbers of people to call. That is not to say that I didn't know whether Captain Butt existed before December the 6th or December the 2nd.

Q. Isn't it true that you knew his name on December 2nd because he called you on December 1st? A. No, sir, that is not true.

Mr. Van Emmerik: Will Your Honor excuse me a moment?

(Short pause in proceedings.)

[118] Mr. Van Emmerik: No further recross, Your Honor.

Mr. Poor: No further questions from Mr. Pendas.

The Court: Thank you. You may step down.

(The witness left the stand.)

Mr. Poor: Now, Your Honor, that completes our case except I want to be sure that certain documents which I understand are on file already will be before the Court.

The first of these is the stipulation of facts, together with the exhibits that went along with that stipulation, and I understand it is not necessary to have that marked as an exhibit since it is right there in the file.

The Court: With reference to that stipulation, after having been well-educated by you gentlemen

*Colloquy*

yesterday, I have concluded that paragraph 23 and paragraph 30 have no relevance to this particular case. Those are the paragraphs dealing with the Flying Independent. I don't think the manner in which the Maritime Commission handles its subsidies or vessels that it is subsidizing, how it arrives at its conclusions has anything to do with this particular case.

Mr. Poor: Could I suggest that you reserve your ruling on that until you are prepared to write the final opinion in the case?

The Court: I will make it a tentative ruling, if you want me to put it that way. So far nobody has demonstrated to me any relevancy

Mr. Poor: Well, of course, we have cited cases in our brief to the effect that a ruling of that sort is pertinent and should be given some weight.

The Court: Is it a completely different consideration prevailing in each case. I can't see how that case has any relevance to this case.

Mr. Poor: Well, is is a dicision that the—

The Court: I will reserve my ruling if you want me to, Mr. Poor, until the conclusion of the case. I can tell you, frankly, that is my ruling unless you can convince me otherwise. In the meantime, I will reserve it.

Mr. Poor: I won't ask for anything more than that, that a definite ruling be reserved.

The Court: Very well.

Mr. Van Emmerik: Would Your Honor hear me briefly on one other matter of relevance objection I have? I have raised several but I am willing to waive all except one. It's not too material but it

*Colloquy*

concerns, as we discussed yesterday, the April 27, 1965 grounding of the Orient Merchant and eventual loss.

[120] Paragraph 36 and on deal largely with that, excluding paragraph 40—well, I guess all of them on deal with the stranding excluding 43 which has to do with the experience of Orient Mid-East Lines, but all the rest have to do with this later stranding. I suggest it is not relevant to the case.

Paragraph 38 says when she went under—

The Court: I didn't read the stipulation with that particular point in mind. Offhand, I am inclined to agree, but let me reserve ruling.

Mr. Van Emmerik: Yes, sir.

The Court: Somebody called my attention to the Flying Independent so I went back and checked that and I see no relevancy involved in that.

Mr. Poor: We have just received word by telephone from New York that the exact amount received on that policy on the Orient Merchant, that is, the cost of railing the cargo was \$34,050.10.

Would that be satisfactory to you, Mr. Van Emmerik?

Mr. Van Emmerik: Do I have Mr. Poor's assurances that he is certain his client made every effort to scrape up all of the claims that might have been made under that policy?

[121] Mr. Poor: Yes, I am quite sure he must have tried to get everything they were entitled to.

The Court: Why don't we do it this way: Why don't we leave the record open on that figure and give you a chance to look at their proofs of loss and proofs of claim, and so forth?

*Colloquy*

Mr. Van Emmerik: I would like that if possible Your Honor. I don't like to seem ungentlemanly, but I would like to see the papers.

The Court: We will keep the record open a few days and give you a chance to see them.

Mr. Poor: Frankly, I don't see that it is very material whether we collected \$34,000 or \$55,000.

The Court: You introduced the policies, Mr. Poor, so he has a right to follow through.

Mr. Poor: Now, the only other thing that I want to make sure is before the Court is the deposition of Captain Orfanos. He was the master of the ship and I think there is probably a great deal of testimony there that is irrelevant, particularly if we don't go into the subject of the stranding. However, there are some other parts of the deposition which are relevant and I would suggest that we have that before the Court and, perhaps, if Mr. Van Emmerik [122] wants some of it out because of irrelevancy, we can agree on that.

If you are not interested in the stranding, I am willing to leave that part out.

Mr. Van Emmerik: It is difficult to refer to that by paragraphs and ask that they be stricken. We have no objection to the whole thing going in. I canvassed this with Mr. Sher on the telephone. There were numerous objections raised——

The Court: Why don't you put the whole deposition in and I will consider only the parts which are relevant, the same way as we are handling the stipulation of facts. I will consider it all part of the record but certain matters, I will exclude from consideration as irrelevant.



*Colloquy*

Mr. Poor: Would it be necessary to have the deposition marked as an exhibit?

The Court: It is not necessary. You can if you wish.

Mr. Van Emmerik: I am not sure that it is filed with the Court.

Mr. Poor: I understand that it is.

The Court: It should be filed with the Court.

Mr. Van Emmerik: It certainly should but I don't [123] know whether it is, Your Honor, or not. I just want to know if it is.

The Court: Do I have the deposition here?

Mr. Van Emmerik: This, I don't know, Your Honor. I know you don't have two exhibits which I have here and I suspect you don't have all of plaintiff's exhibits.

Mr. Poor: I think we will have to make sure that all of the exhibits are in.

For instance, one of the questions that Mr. Van-Emmerik was asking Mr. Pendias a few minutes ago about was what cargo was loaded at Milwaukee and Chicago. It is, I think, shown by the testimony and by one of the exhibits. We have a stowage plan there that would show when it was loaded.

Mr. Van Emmerik: That is right.

The Court: Offhand, the papers I have here—I am just thumbing through them. I don't see any deposition here, if it has been filed.

Mr. Poor: Well, we will straighten that out, Your Honor.

The Court: May I suggest that you gentlemen go through these official records and agree on what should be made a part of this record.

*Colloquy*

[124] Mr. Van Emmerik: Yes, Your Honor.

The Court: And then we can stipulate as to what the record consists of. But the deposition, I don't see it.

Mr. Poor: I know in the old days in New York, we never marked depositions as exhibits.

The Court: They were considered part of the record.

Mr. Poor: They were considered part of the record. We would say, I offer this deposition, and it was considered part of the record.

The Court: I don't even seem to have the deposition, Mr. Poor.

Mr. Poor: Well, of course, the local counsel here have arranged for that.

The Court: Well, I suggest you gentlemen look at my record, what I have here, and agree as to what should be considered as the record of this case, including the deposition which someone will have to submit to me.

Mr. Van Emmerik: Mr. Sher just reminded me that at pretrial, this deposition did not appear to be in the record and this was before Commissioner Finn. And Mr. Sher telephoned down to the Clerk's Office and they said that yes, they had found it. So, we have later intelligence that it is somewhere in the courthouse. If it isn't, we both have copies [125] and we can stipulate it into the record.

Just for the record, I would like to say there were objections made by Government counsel from whom I inherited the case. All those objections are waived.

*Colloquy*

Apparently, the parties kept the exhibits rather than leaving them with the reporter. I have the two Government exhibits. I suppose Mr. Poor or somebody on the other side has the plaintiff's exhibits. I would like copies of the stowage plan so I could see them. No copies were attached to the deposition I have.

If I may, I would like to file these two with the Court now or if Your Honor desires, I will keep them until we find the deposition.

The Court: What are they, exhibits to the deposition?

Mr. Van Emmerik: Yes, Your Honor. They are Exhibits A and B, and that is all.

The Court: Well, let's find the deposition and attach them to the deposition.

Mr. Van Emmerik: All right, Your Honor. Then I'll hold them.

The Deputy Clerk: Do you know which case it was filed in?

Mr. Van Emmerik: It was to have been filed in all [126] four cases, I believe. It was filed before consolidation, so it could be in any one of them.

The Deputy Clerk: Do you know the date when it was filed?

The Court: Well, if you gentlemen could agree on what should be the record in this case before the Court, what has been produced at pretrial and that sort of thing, and find the deposition for me.

Are all the exhibits attached to the stipulation of facts, are they all agreed as being part of this record or is there any objection to any of them?

*Colloquy*

Mr. Poor: No objection on behalf of the plaintiff.

Mr. Van Emmerik: Only as to those which relate to, again, the stranding, Your Honor, or also to the Flying Independent episode before the Maritime Administration. These would all depend on Your Honor's ruling already and your deferring ruling on the relevancy objection I raised at the last. So, except for those exhibits which pertain to those paragraphs under consideration, I have no objection.

The Court: Very well.

Mr. Poor, where in the record does it appear how you substantiate your damages, and so forth?

Mr. Poor: Our damages?

[127] The Court: I mean your storage charges and all that. Are they all included in these exhibits?

Mr. Poor: That's in the record. It is paragraph 28 of the stipulation. That gives the amounts of the second freights. Then the storage charges are in paragraph 33.

The Court: And they are substantiated by Exhibit "O".

Mr. Poor: They are substantiated by this tariff which is Exhibit "O". As I understand it, we are going to have some testimony on storage charges by a witness called by Mr. Van Emmerik.

Mr. Van Emmerik: Your Honor understands, of course, that we except—I don't think violently is too strong a word to use—to the use of demurrage charges.

The Court: I understand that. I am just trying to find out—If they are using specific figures, I just want to see how they are arrived at.

Mr. Van Emmerik: Yes, Your Honor.

*Colloquy*

The Court: I am not making any concession of the validity of any figures at all at this particular time.

That concludes your case, then, for the time being, Mr. Poor?

Mr. Poor: That concludes our case.

The Court: Are you ready to proceed, Mr. Van Emmerik?

[128] Mr. Van Emmerik: Yes, Your Honor.

I would like to proceed by beginning with a motion to dismiss the action on the basis of Mr. Pendas' testimony and on the basis of deposition testimony which is or should be in the record. I will be very brief, Your Honor.

The shippers in this case were entitled to have the best judgment of the carrier as to weather conditions and the possibility of exiting the Seaway. They didn't get any such thing.

Mr. Pendas testified that he didn't draw any conclusions himself, he didn't draw it on any evidence; he just dumped the whole thing on the lap of the Seaway.

That is not what we dickered for. We dickered for the expert services of an expert carrier. This carrier was supposed to be, and it is stipulated to have been and we believe that he is, expert in Seaway operations; but he didn't live up to those expectations. He didn't act like an expert. He delayed unduly and got himself frozen-in with our cargo.

He has been paid for what he undertook to do. He should not get a second freight. He should not

*Colloquy*

get winter storage expenses or late collection expenses.

Now, the Captain of the Orient Merchant testified, first of all, that he never looked up any weather information [129] either. I was looking for the reference before; it's downright precious. He said, "What do I need weather information for; I can look out the window and see what the weather is."

This is the sort of casual approach that we have had all along in the case.

The Court: This is the evidence we don't have in the case yet.

Mr. Van Emmerik: This is the evidence we don't have. It has been taken. I need it to argue with now. I assume it is going to be forthcoming sometime. The man said this under oath at some time in history. I have got a copy of it.

He, furthermore, testified that he knew perfectly well that November 30th was an official closing date and after that, all the risk fell on the carrier or, at least, so he understood.

And it was his experience, although he had never been through the Seaway later than December 2nd or 3rd, that it always stayed open until the 10th or 12th or 15th of December—again operating on another assumption, never took any effort to go to the Seaway offices for notices to find out what was happening, never tried to find out what was happening.

And the real icing on the cake is that he testified [130] that—The deposition.

*Colloquy*

(The deposition of Captain Orfanos was handed to the Court.)

The Court: Excuse me, I didn't mean to interrupt your argument. Is this the only deposition that was taken in the case?

Mr. Van Emmerik: It is, Your Honor.

The Court.: This is the deposition of Captain Orfanos, right?

Mr. Van Emmerik: Yes, sir.

The Court: All right. Go ahead.

Mr. Van Emmerik: The icing on the cake I was speaking of, Your Honor, is that as far as this Captain was concerned, he was tracking the Flying Independent.

On page 14 of the deposition:

"Question: Was there another ship at the Port of Kenosha at that time?"

Mr. Pendas agreed that the Independent was at Kenosha. This is where the agreement between the man's master under God of the Steamship Orient Merchant and his dispatcher diverge.

"Answer: Yes. There was the Flying Independent.

"Question: Did you keep in touch with the Flying Independent?"

[131] "Answer: Yes. We knew the times she was supposed to sail and loading—all her actions in the port.

"Question: Do you know if she sailed before you did?"

*Colloquy*

"Answer: We sailed first, and we reached first at Iroquois Lock in Welland, on the seaway."

Now, no only do they try to dump it on the lap of the Seaway, but the expert judgment we were getting was whether or not the Flying Independent was going to clear.

Mr. Pendias said he didn't pay any attention to what she was doing so I was unable to cross-examine. It so happened that she was carrying military cargo and there were rumors that she would be able to get out, come what may, American military cargo.

Now, this is not what we bargained for. We scarcely got what we did bargain for. We got, for one full freight, one-third delivery as I said before. I don't see why we should have to pay a second freight and exorbitant over-winter storage charges; and I don't see why we should be taxed for interest charges and the legal expenses in collecting the first freights that were very questionably due under the circumstances of this case, the very dilatory behavior of the shipper.

Accordingly, without further ado, I move to dismiss.

[132] The Court: I haven't heard enough evidence and I haven't seen the deposition until this moment, so I am not going to grant any motion to dismiss at this particular point. I will keep it under advisement.

You may proceed with your witnesses.

Mr. Van Emmerik: May I bring my three Canadian witnesses back into the courtroom? They left when Mr. Pendias testified and I will be calling them



*Colloquy*

in order. They are in the hall, the three Canadian witnesses, Your Honor.

The Court: You are going to bring them in seriatim, one at a time, aren't you?

Mr. Van Emmerik: I planned on having them all in, Your Honor.

The Court: Well, I don't think you should. Do you want a rule on witnesses?

Mr. Poor: Well, we would really prefer that we should have them in the courtroom only one at a time.

The Court: That is the usual procedure when you have a rule on witnesses, that they do not listen to each other.

Mr. Van Emmerik: We had a rule on witnesses, Your Honor. As I understood it, it was that they should be excluded when Mr. Pendas testified and not when each other [133] testified.

The Court: No. That is not the usual rule on witnesses. Usually, we have one witness in the courtroom at a time.

Mr. Van Emmerik: Yes, Your Honor. I know the usual rule. It wasn't invoked before.

The only reason I suggest this is I think it would advance the course of the trial if they could hear what each other is saying.

The Court: Well, I don't think it is a good policy to have one witness listening to another one when they are all coming from the same outfit. Let's have only one at a time.

Mr. Van Emmerik: All right, Your Honor.

Mr. Burnside, please.

Whereupon,

*Colloquy*

ROBERT JOHN BURNSIDE called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Van Emmerik:*

Q. Mr. Burnside, state your full name and address for the record, please. [134] A. My name is Robert John Burnside. I live at Cornwall, 1501 Peters Street.

Q. That's in Ontario, Canada? A. Ontario, Canada.

Q. What is your present position or job, Mr. Burnside? A. Director of operations, St. Lawrence Seaway.

Q. Is that the senior technical position with the Seaway? A. It is.

Q. How long have you held that position? A. Since the Seaway opened in 1959 and a month or two before that.

Q. What was your position before that? A. I was director of Canals of Canada since 1955, and I have been with the Canals altogether for thirty-one years.

Q. Did the Canal job encompass what is sometimes called the old Seaway, the shallow draft Seaway into the Lakes? A. Yes, it was included. It and the Welland Canal were included in the Canals of Canada.

Q. And what sort of positions have you occupied during those years with the Canal Authorities in Canada? [135] A. Well, I began as an engineer after graduation in Civil Engineering and about five years' experience with consultants, I joined the Department of Railways and Canals, the predecessor of the Department of Transport, and I served as engineer for some years and followed through the various positions in the Canal Services until I became director in 1955 and was responsible to the Deputy Minister of the Department of Transport.

*Robert John Burnside—Direct*

Q. Turning now to your position with the Seaway as it now exists, the deep draft Seaway that we are all talking about in this suit, the one that opened in 1959: There is provided by regulation and Seaway handbook and notices a certain formal closing date of November 30th. Do you know how this closing date came to be established? A. Yes, I do. It was established by consultation with the records of past years that there were available to us with our own experience throughout the years of those most closely connected with the management of the Canals. It was chosen as the date that was not absolutely sure that the Seaway System would be frozen, but it gave us quite a reasonable margin of safety of a matter of some days, normally, that we could expect ships still to pass before freeze-up.

There have been cases on record where the freeze-up [136] occurred before November 30th, but they have been comparatively rare and the 30th was thought to be a reasonable date to set.

It always made clear to the trade that there was no guarantee, either implicit or implied that the Seaway would not freeze. We never set ourselves in a position of attempting to rate such a high status.

The Seaway does not freeze on an average; it freezes on the specific year. While we and others speak of running the Seaway, I am convinced that the most difficult thing that we have to do is to arrange the stoppage of the Seaway. In other words, to close it.

Now, there was a period when we closed it on a specific date. It was not at that time a formal date; it was a specific date by which the ships had to clear. There was a certain doubt in our own minds, as well as representatives from the trade requesting that the date be kept open so that they could take advantage of any mild weather that might ensue after

*Robert John Burnside—Direct*

the 30th of November. This was done and one of our chief concerns was to make it clear to the trade that they could not have it both ways, both an extension of the time and a continuance of whatever leeway existed before the extension of the date of the 30th; it was a continuation until we were closed by ice.

[137] Q. Is it, then, closure by ice that now determines the actual closing date of the Seaway? A. Yes, it is. There are exceptions to that where work that is scheduled for the winter must be started at a specific time in order to complete it in time to open again in the spring. This is the case in the Welland and it has been the case for more than one year in the Ontario-St. Lawrence part of the Seaway. So that it may be closed by a notice due to contract schedules which require us to stop the traffic so that we may start again early in the spring.

Q. On that last point, Mr. Burnside, I refer you to the Seaway notice No. 10 of 1964 which is in the stipulation at paragraph 7, the body of it is on page 5. This last paragraph "Due to the construction program," is that what you are speaking of? A. That is right. This refers, in this case, to the Welland Canal. The closing date of December 15th could not be extended.

Q. No matter what the weather might be? A. That is right. We might close earlier than that but not later.

Q. Will you describe in general terms, without reference [138] to the year we are all concerned with here, 1964, the icing conditions in the Seaway, how and when and why it tends to ice and where the critical points are? A. Well, the critical point in the Seaway occurs at the St. Lambert Lock, which is in the Montreal area. It is the most northerly of our system of the Seaway proper and the climatic conditions there are more severe.

*Robert John Burnside—Direct*

We are also affected by the fact that the comparatively warm water from the deep lakes, Lake Ontario in particular, has traveled for a considerable distance through the river where the water is more exposed to air and loses its heat more generally and, in other words, cools off so that the freezing occurs in almost every year first at St. Lambert.

Q. Will you tell us now with reference to 1964, the situation at St. Lambert, if that is where it occurred or where else if it occurred elsewhere, that led to the closure of the Seaway? A. The period of 1964 was more severe than we had had previously.

To understand the problem, I think you must remember that while we can review the calendar in retrospect, after the event, and know that this year, for instance, is a cold year and that year is a mild year, as you approach it in [139] actuality, you have to make your judgment on the climatic conditions pertaining at the time and on somewhat sketchy forecasts that are available for pre-guessing—if I may use that term—of the future.

During the early part of the closing season which we generally considered to start about the middle of November, the temperatures were lower than they had been.

Q. Excuse me. Are you referring to air temperatures or water temperatures? A. I am referring to water temperatures caused largely by air temperatures, of course; but the air temperatures fluctuate so rapidly that the water temperatures have been found to be a much better guide as to the amount of heat that remains in the water which will prevent it from freezing.

By the beginning of the fourth week in November, we became concerned that this was going to be an especially cold year and we arranged to have the trade generally made aware of our concern through certain telegrams and news-

*Robert John Burnside—Direct*

paper articles; and as the period advanced, we had no reason to revise our earlier estimate as to the fact that it was going to be a cold year but, rather, our worries increased and our chief worry, of course, was that all the ocean shippers would make their way to the entrance Port of St. Lambert and clear [140] the system before the freeze-up.

We kept the trade advised of the specific water temperatures by tri-weekly telegrams——

Q. Does that mean three a week or one every three weeks? A. It means three a week.

And there is a difficulty here in conveying to the trade our estimate of the situation. We don't claim to, perhaps, foresee the future a bit better than anybody else—certain people seem to think we ought to be able to; we only wish we could—but we do refer to the specific water temperatures, knowing that they will realize that as it approaches 32 degrees, it will begin to freeze and when it reaches 32, it will freeze and, therefore, make their estimates of the risk that they are running compared with the profit that they may make from their business efforts, know whether it is safe and wise for them to delay their vigilance, for instance, to pick up more cargo, to work weekends and off hours at premium rates for longshoremen to complete their loading and leave the system.

You can't continue to say, "We think it's quite bad." You soon run out of adjectives and, therefore, we go to the degree of heat in the water, the degree temperature Fahrenheit.

[141] Q. These water temperatures, how were they disseminated to the industry? A. They were sent through the Shipping Federation of Canada who represents the ocean

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trade, and to the Dominion Marine Association representing the inland trade, that's the ocean shipping.

Q. Was this information also available to anybody who inquired about it? A. Yes. We were continually replying to inquiries from interested parties who seemed to get some satisfaction in our reading the telegrams to them as well as having it in front of them on their desk, and reviewing the situation which we did repeatedly and continuously throughout the period. We gave them our best estimate. In that particular year, we told them that we thought it was going to be an early freeze by all indications.

You have to be very careful—if I might take a second—in trying to forecast the future because you may find that tomorrow morning the sun is shining and the temperature has gone up ten or fifteen degrees and it turns out—in fact it has been on a number of years—that the freeze is late. It is not necessarily an early freeze because it starts early and this is one of the factors that the owners must weigh [142] in determining whether they are going to follow our advice with respect to leaving the system or whether they will remain for perhaps higher profits or more effective coverage of their business.

I should say here that of all the shipping people with whom we deal and the various ships, I am quite sure that no two of them are alike and each have their own problems so that we must avoid overemphasis or alarmist tactics.

Q. Now, you mentioned before that the Seaway freezes not on an average but on specific years. Would you elaborate on this idea, please? A. Yes. The rate of cooling of the water varies very widely. When we take a temperature of 35 degrees, remembering that the water begins to freeze at 32 degrees and when it becomes 35 degrees, we have a practice—more for effect on ourselves than anything else—

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of beginning to put the figures in red. We take more effort, if that is possible, to obtain the latest weather reports. We increase our vigilance as far as possible, and we become more alert to any indication that we may have as to the probable time of freezing.

The water might drop at 1 degree a day, it might drop at 1 degree in three or four days, it might go down and come back up again depending entirely on the weather, the wind and [143] other conditions pertaining. The warm water might be driven to one end of the system and mixed more thoroughly with the other waters, remembering that the water is a stratified thing at this period with the cold water at the bottom, until the 32 degrees when the cold water comes to the top.

I don't know whether I have answered your question as you wished, sir.

Q. You have. Thank you.

Mr. Van Emmerik: I don't mean to be impertinent, Your Honor, but would Your Honor like to take a recess now?

The Court: Are you going to be very much longer?

Mr. Van Emmerik: I think I will be probably another fifteen minutes, Your Honor.

The Court: All right. Then, we will take a ten-minute recess.

(Whereupon, at 11:20 a. m., a recess was taken.)

*By Mr. Van Emmerik:*

Q. Now, Mr. Burnside, with reference to the tri-weekly telegrams by which you advised the industry through the



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Shipping Federation of Canada, the Dominion Marine Association and others, on what date in 1964 were these telegrams begun to be sent out? A. On the 16th of November. We normally start in the [144] middle of November and that year, I remember it was the 16th.

Q. Now, is there any information contained in these telegrams besides the 1964 water temperature? A. It is compared with the previous year's temperatures.

Q. At any particular spot in the Seaway? A. Yes. We quote St. Lambert as the most critical and further up the river as a comparative.

Q. Now, is there any other information about vessels and the like contained in these telegrams? A. We give the number of vessels still above St. Lambert because this has a very marked bearing on the situation with respect to the number of days or hours which it would take them to clear, because a large number of ships means probably a lineup if conditions become critical and they all attempt to exit at once. We can't take them any faster in a critical situation. The locks are operated as quickly as possible on normal trips, so this is a factor that they must weigh carefully to determine their chances of getting to the sea if there is a sudden breakdown in a ship. In our waters in many places, a broken ship can't be passed. Or a breakdown in the lock system itself, a power failure, for instance, or an accident of some kind that would put the system out of commission for a period of a day or two, and if that should [145] occur, the lineups increase very rapidly and the number of ships passed per day is likely to decrease with the number of ships waiting due to congestion.

Q. Assume a normal day, leaving cold weather and other troubles aside, about how many ships per day can the Sea-

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way pass both ways? A. The St. Lambert end, it is around 30 ships, 15 each way.

Q. Now, does cold weather or the formation of ice tend to slow down the transiting process? A. It makes a very marked difference increasing the difficulty of the movement of the ships, the movement of the lock system itself and depending on the severity, it could drop as low as a ship a day or perhaps more than a day to pass a ship. It becomes very, very difficult.

Q. What is it about ice that makes the operation of the locks difficult? A. The ice in the reaches—and this is the wide stretch of water from one lock to another; it is referred to as a reach—freezes to a certain thickness, let us say three inches or six inches, and while it is there and undisturbed, the ships have comparatively little difficulty in going through it. They can break it quite readily. But as it is pushed [146] down through the locks by the ships and the movement of the ships and by the movement of the current which is downbound, this ice accumulates in large bunches which by the movement of the ship are pushed one on top of the other and if the air temperature is severe, they freeze rapidly together and they become a laminated mass of ice which is many times the thickness of the original undisturbed ice, and they become so thick that the ships have difficulty in pushing it aside.

The ice also occupies space in the lock itself so that there is literally no place to put the ship when it comes. And the procedure is—if I may take just a moment—the ship approaches the lock downbound and they continue to lock in until there is no more room for a ship, in which case the ship is backed out again, the lock is closed up and the quantity of ice in the lock is lowered to the lower reach and

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is flushed out in the lower reach. Now, this it time consuming in itself and tends to clog the next reach, as a matter of fact, but this continues until the reach in the immediate upper side of the lock is comparatively free of ice when the ship is again brought forward.

Now, invariably, they bring more ice with them but they are likely to be able to get in on the second try.

There are cases where the ice is packed against the side [147] of the locks. This type of ice is formed from what we call slushing. Small particles of ice which in themselves are not resistant but they are pressed against the lock wall by the force of the ship, adhere to the wall. When the water is dropped as the ship is lowered in the lock, they are exposed to the air and readily freeze. This process also continues until there is no more room for a ship and the ice has to be batted off the walls.

Q. Is there any particular part of the lock structure that is vulnerable to ice? A. Gates are vulnerable to ice. Ice may lodge behind the gate and act as a force to upset the gate, which would mean to swing it off its hinges; or the ice may come between the ship and the gate and force a forward motion of the ship. A great force is impelled on the gate structure itself, and they are definitely susceptible to damage.

Q. Will you describe these conditions now with specific reference to 1964, when the ice began to form at St. Lambert if that is where it formed, and exactly what happened leading up to the actual closure of the Seaway in 1964? A. Our chief concerns were two: one was to clear the locks, the system of the ocean shipping which loses their trade business during the closed period, which is not true of [148] the inland people. And the second one was the maintenance

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of the Seaway system, the locks themselves, the gates. Since they are susceptible to damage, we feel it is our duty to see that they are not put out of commission inadvertently or carelessly.

And in this specific case, in 1964, we did specifically stop the movement of shipping before the gates suffered serious damage. This occurred at the St. Lambert Lock where the ice became severe, accumulation was becoming quite intense; upbound ships were unable to force their way in. I remember that they offered to back off a half a mile or so in the reach—the exact distance I don't remember precisely—but back off in the reach and charge the opening, contending that they could force their way through. This, of course, we would not permit and, therefore, it was closed.

Q. Do you recall what date in 1964 it ultimately became necessary to close because of this impossibility of going through? A. I remember very well. It was on the 5th of December when the forecasts were fortelling colder weather, more severe frost, when the ice was becoming thicker. We reviewed the situation and decided that we must close, that we couldn't receive further ships. This was a Saturday. I recall that [149] particular day because communications with other places are probably a little more difficult on a Saturday than the normal work day.

But the situation was reviewed and about noon, it was determined there was nothing we could do but give a warning which indicated midnight when no further ships would come into the system. I remember that we were telling the trade that we would try to clear the ships that were already there between Iroquois and St. Lambert, but that we were concerned that we could not.

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As the day wore on, the conditions became more severe and towards the middle of the afternoon, we broadcast the closure that no further ships would be permitted entry after midnight of that night, the 5th.

Q. Do you recall when it became physically impossible to pass any more ships through St. Lambert, what day and what the circumstances of passing vessels were at St. Lambert at that time? A. After having decided that we could do nothing but close, I dispatched my special adviser, Mr. MacKenzie, to St. Lambert to personally review the situation there with our forces in the Eastern Region who are in charge of that lock [150] to watch particularly that we could safely continue to pass ships that were already down-bound and to see that our system was protected as far as it was possible and reasonable for us to do.

The following day, the 6th, Mr. MacKenzie was in touch with me by telephone and he told me that the situation was becoming intense, it was severe; that the upbound ships were unable to enter. If my memory serves me right, it was at that period that the offer to charge the locks was made, and we concentrated our efforts at that time in getting the remaining ships out.

Q. Before deciding to close the Seaway, that is the Iroquois Lock on the 5th and St. Lambert on the 6th, did you make any attempts or order that any attempts be made to get in touch with specific members of the shipping public? A. Yes, we did. We asked the agents and their representatives in the person of the Shipping Federation, and the Dominion Marine Association as well, to give us a list of the ships giving their expected time of arrival at Port Colborne, which is the upper entrance to Welland, and at Iroquois which is the upper entrance to the Lake Ontario-Montreal section of the Seaway. The reason these ports

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were chosen was that a ship's voyage from the upper lakes to Port Colborne [151] at the head of the canal could be quite accurately foretold by them. When they arrived at Port Colborne, it would depend quite largely on the number of sister ships that were lying at anchor waiting to go through, and also on the conditions of the locks and the trade there itself including opposing upbound ships which were still moving at that time. The critical point would be the lock at Iroquois. The run from Port Weller to Iroquois could be told by them. They might be trading at Toronto or Hamilton between the Welland and the St. Lawrence.

So that these were critical points for us, knowing that there had been occasions in the closing period when ships might lie for days fogbound unable to move after having entered our system.

Q. That would be after passing Iroquois? A. After passing Iroquois Lock.

Q. May I interrupt you here for a moment? There are certain telegrams which are stipulated into the record and I want to make sure these are the telegrams you are speaking of about querying the industry.

I am speaking now about paragraphs 15 and 16 on page 7 and paragraph 17 on page 8. There are four telegrams.

Are these the sort of telegrams you are referring to? A. Yes, that is it.

[152] Q. Now, let's look over on page 8. There were also other telegrams to Eagle Ocean Transport. Were they in that same line of telegrams? A. Yes, they were.

Q. Thank you.

Now, did you have a purpose in acquiring these expected times of arrival? A. Yes. We maintain a chart showing the ships, their expected time of arrivals and they are pre-

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pared for the purpose of advising the trade if any serious bunching is evident; also so that we may watch their progress and those that would appear to be somewhat late in our opinion would be contacted and made aware of the situation and suggested or, in fact, advised to take some steps to clear up the situation so they wouldn't be trapped. This was the whole purpose of this procedure.

Q. Did you issue orders that this contacting be done?

A. Yes.

Q. Did you issue these orders to any particular people on your staff? A. Yes. Those who were in charge of this or who actually did this work were Mr. MacKenzie and Captain Butt. They were instructed in the normal procedure but in specific [153] cases, they were individually requested or instructed to make an effort to contact the tardy ones and tell them the facts of life so that they might appreciate the situation more clearly, perhaps, and with a view to having them clear before they became caught.

Q. Was the plaintiff in this case, Orient Mid-East Lines, one of those that you specifically directed be contacted individually? A. Yes, they were.

Q. Did you indicate to Mr. MacKenzie and Captain Butt any particular form of warning that should be given the various operators? A. There was a general procedure that in talking with the companies—and we talked with many—that the temperature and the factual conditions were drawn to their attention; but more particularly, they were made aware of the fact that in our opinion they should begin to do something about getting to clear, otherwise they stood a very good chance of spending the winter in the Lakes.

Q. When did these special warnings begin in respect to these telegrams of the 25th and 26th, the telephone con-

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tacts to the parties? A. They would start shortly after the compilation of [154] the results that came in.

Q. When you say "results," you mean the results of the ETA inquiries? A. Of the ETA inquiries, yes. The specific date when we started them, I don't know.

I should perhaps say for some background that, normally, a telephone call to a shipping official was apparently given serious consideration and, normally, they did something about it. The revised ETA's would begin to show a change and an improvement in the pattern if this was indicated.

Q. More ships backed off their expected times of arrival? A. Yes, it was our inducement for them to do so.

Q. Were these the particular ones that you felt were problem ships? A. There were problem ships, including the two under consideration here.

Q. On these tri-weekly telegrams, Mr. Burnside, do you have with you copies of the telegrams sent out on or after November 26th of '64? A. I do. They are in my briefcase at the rear of the courtroom. May I have permission to get them?

The Court: Surely.

[155] Mr. Van Emmerik: Go ahead, Mr. Burnside, you may get them.

(The witness left the stand temporarily.)

*By Mr. Van Emmerik:*

Q. Will you give us just the dates of these telegrams when you are able, Mr. Burnside? A. I have a telegram here of November 23rd.

Q. And what is the next one after that? Just go right through to the end of them. A. November the 25th.



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There is a telegram of November the 26th of a somewhat different character than that described. This particular telegram of the 26th arose because we were becoming concerned that the ships would not all clear. I discussed the matter again with the president of the Authority and arranged that a telegram be sent out from our Ottawa office, which is the headquarters for the Authority, and it was given to the newspapers and addressed to Matheson, Assistant General Manager of the Shipping Federation of Canada for dissemination to the trade.

Mr. Poor: Your Honor, we shall have to object to this telegram unless it is shown it was brought to the knowledge of the plaintiff in this case. Sending a telegram [156] to the Shipping Federation of Canada, which is a Canadian concern, means nothing. We don't know anything about it. We have telegrams, of course, that passed between the Seaway and the plaintiff. The Seaway sent us a telegram on November 25th and asked for the ETAs of our vessels.

The Court: But the issue in this case, Mr. Poor, is whether or not the plaintiff should have kept abreast of affairs to be on notice as to the situation at a particular time. Now, the Seaway is using all these efforts to get word to the carrier. I think it is perfectly permissible to infer that the carrier should have been alert and found out about these things.

Mr. Poor: I call your attention to the fact that in the telegram of November 25th which was sent to us, nothing whatsoever was said about the cooling off——

The Court: I still think it is pertinent as to what warnings were sent out to the trade in general.

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Mr. Poor: Well, they were sent out to the Canadian trade.

The Court: I think your client said that he was a member of the Canadian Federation.

Mr. Poor: No.

Mr. Van Emmerik: An agent, Your Honor, Hurum [157] Shipping.

*By Mr. Van Emmerik:*

Q. Will you just go on and give the dates of the other telegrams and then we will take them up in order, I think.

A. November the 27th; November the 30th; December the 2nd; and December the 4th.

Q. Thank you. Now, do each of these telegrams have the water temperature comparison that we spoke of earlier in your testimony? A. Yes, they do.

Q. Could you, refreshing your memory off the face of them, tell us how the water temperatures in 1964 on the dates of those telegrams compared with the same date in 1963? A. On November 23rd, 1964, it was 36 degrees. The same date the year before, it was 44 degrees.

Q. As you read each one, would you also indicate how many ocean vessels had yet to come downbound through your system before they could reach the sea? A. At that date, there were 93 ships above St. Lambert.

Q. All right. Will you just go to the next telegram and take them all in order, please. A. On November the 25th, water temperature in '64, 34.5 degrees; the same date the previous year, 43 degrees. There [158] were 123 ocean ships above St. Lambert.

The telegram of November 27th——

Q. You skipped the 26th, didn't you? A. I skipped the 26th. It is of a different character, as I mentioned earlier.

*Robert John Burnside—Direct*

Q. It doesn't start off with water temperature data? A. Excuse me. "Water temperature at St. Lambert Lock this morning down to 35 degrees Fahrenheit, six degrees colder than on the same day last year."

Q. Thank you. Now, with the 27th and on, please. A. The 27th, 1964, 34.5; last year 41 degrees. There were 113 ships were still above St. Lambert.

November the 30th, water temperature 34.5; the previous year 40 degrees. Eighty-three ships were still above St. Lambert.

On December the 30th, water temperature in 1964, 32 degrees Fahrenheit; last year 36.5 degrees. Sixty-seven ships were still above St. Lambert.

December the 4th, water temperature at St. Lambert 32 degrees; last year 34 degrees. Thirty-nine ocean ships still above St. Lambert.

Q. Does that have any notation about ice formation at [159] St. Lambert on it? A. It has the following notation, "Ice is slowing ship transits at St. Lambert."

Mr. Van Emmerik: Now, Your Honor, we propose not entering these into evidence. They are copies from Canadian Government files and Mr. Burnside would like to return them to his files. If it is desired that they go in, it can be arranged but it would be an inconvenience to the Canadian Government.

Mr. Poor: I think they should be marked for identification.

The Court: Can't you get xerox copies of them?

Mr. Van Emmerik: Yes, Your Honor.

Would it be possible, Mr. Burnside to have these?

The Witness: Yes, indeed.

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Mr. Van Emmerik: All right.

The Court: Are these your official files?

The Witness: Yes, they are copies from our original files.

The Court: Can you leave the copies with us?

The Witness: Yes.

The Court: You have no objection to the use of copies, do you, Mr. Poor?

[160] Mr. Poor: Not if they are xeroxed copies, no.

Mr. Van Emmerik: Does your Honor desire that these be numbered consecutively or with a number and sub-A, -B, or how does the Court wish it?

The Court: It doesn't make any difference. Call them 1-A, 1-B, 1-C and so on.

Mr. Van Emmerik: All right. Exhibit 1-A will be the telegram dated the 23rd.

The Deputy Clerk: Defendant's exhibits 1-A through 1-G marked into evidence.

(Telegrams dated November 23, 25, 26, 27, 30, December 2 and 4 were marked Defendant's Exhibits 1-A, 1-B, 1-C, 1-D, 1-E, 1-F and 1-G into evidence.)

*By Mr. Van Emmerik:*

Q. Before the Seaway began its operations in 1959, that is the deep draft Seaway, you I believe were directors of operations of the shallow draft Seaway. Would you tell us when the most recent—if there was any—freeze occurring before November 30th of any given year occurred? A. No. They occurred before my time. My memory is that it was in the order of 1948. That is, my time with the [161] Quebec Canals.

*Robert John Burnside—Direct*

Q. Was there one in 1958? A. I'm sorry. In 1955, 1957 and 1958, we had very severe freezes occurring close to November the 30th. They impeded shipping to a very marked degree for each of those years. Some of the cases, we had ships frozen-in into the locks and had to thaw them out by steam. These were smaller ships in smaller locks and were somewhat more readily unfrozen, to so speak, than the big ships would be. The old locks, the wooden locks, gates, were susceptible to some distortion which was not the case with the steel gates. They are more subject to shock and destruction.

Q. Who stood the expense of getting those vessels that were frozen into the locks out? Who paid for thawing them? A. This was part of the Government of Canada paid for thawing them. The only part that I recall—it was a group effort as far as I was concerned. We used the steam off of the steamers if they were steam ships. We used tugs if we could get them around. The trouble with tugs is when you have them racing about, they stir up more ice and often increase your difficulties and also are very difficult to bring to bear on the ship when its in the lock. In fact, it's almost impossible. The main costs of the locks themselves were carried by the Government. I do recall that it was a sort of a group [162] arrangement whereby the shippers who were above the exit lock at the time it was necessary to hire a tug on account of ice, all involved assisted or contributed in general. This was the arrangement to the tugs but not the gates.

Q. Do you recall how much it cost the Canadian Government? A. I do not remember.

Q. Would you describe for us the burden placed on your operations office in the closing days of the 1964 season, how you spent your time in that office? A. Well, it is definitely the most critical time. There are continual inquiries,

*Robert John Burnside—Cross*

all want to know the latest information that we have. They try to read our minds by what we say in an attempt to forecast when we are going to decide to do something. This is a very serious business for all concerned and it is a very busy period. The telephones are in general use—I was going to use the word “constant,” but it’s nearly so. People are anxious, they are concerned. They are upset, most of them. Those who are behind wish they were ahead, and those who have lost cargo and see the others that are loaded, they wish they were behind sometimes. So that people are in a state of worry and it’s an extremely busy period for us.

[163] Mr. Van Emmerik: Would Your Honor excuse me for just one moment, please?

(Short pause in proceedings.)

Mr. Van Emmerik: No further direct examination, Your Honor.

The Court: Very well. Mr. Poor.

*Cross Examination by Mr. Poor:*

Q. Mr. MacKenzie, in recent years—— A. Burnside is the name.

Q. I beg your pardon. I’m sorry.

Mr. Burnside, in recent years, you have changed your November 30th date to a later date, isn’t that so? A. Yes——

Mr. Van Emmerik: I object to the relevance of anything occurring afterwards, after this December ’64 date, by which time Mr. Pendas was supposed to have the experience involved in this lawsuit.

The Court: What is the purpose of the later date, Mr. Poor?

*Robert John Burnside—Cross*

Mr. Poor: Well, the whole point is——

The Court: We have to deal with the situation in 1964.

[164] Mr. Poor: That is true. I want to know whether there was any change in the Seaway or whether this was simply better thinking on the part of Mr. Burnside and his friends or——

The Court: Well, we have to deal with the conditions as they were then. Perhaps there is better weather forecasting now or something like that than there was in 1964. I don't know, but I don't think it is relevant.

Mr. Poor: Don't you think I can ask him about weather forecasting?

The Court: What difference does it make? We have to deal with the year 1964 and the years before. We have to deal with the experience as it was then. We have a weather satellite up there now. Maybe it's more accurate than it was before, but I don't think that is relevant.

Mr. Poor: Well, I would like to ask him if he relied on the weather satellite.

The Court: I think we had better stay with the conditions in 1964 and the years before.

Mr. Poor: May I respectfully have an exception to Your Honor's ruling?

The Court: Yes, surely.

[165] *By Mr. Poor:*

Q. Now, do you remember the date of the closing of the Seaway in 1962 and '63? A. I have the data here that I might refresh my memory with.

*Robert John Burnside—Cross*

Q. Well, it has been stipulated that in 1962, the closing date was December 7th and in 1963, it was December 10th. But I understand that in 1963, closure as regards inland vessels was not until December 13th. Would you accept those dates? A. I think that those dates are materially correct. 1963 was a mild year.

Q. Now, why is there a distinction between inland vessels and non-inland vessels? A. It's just a matter of business: the ocean shipping, if they do not clear the system, they lose the four and a half months approximately of business; the inland shipping continue to trade as long as they can travel reasonably and they are quite prepared to tie up, sir, at whatever the closest lock is when they can proceed no further. This is a matter of establishment in their business and the trade is set up to do this.

For instance, the Wheat Board arranged to load the late [166] ships for winter storage, which involves some special cleaning of the ships I believe. But they are loaded for winter storage so that if they are caught in their voyage from the Lakes to the elevators in Montreal in that area, they can tie up for the winter and not only get paid for storage but the wheat is in good order and partly on its way for the next year.

This applies to a great deal of the inland trade and they regularly do it, so that they take no particular risk in crowding the closure period a little more closely; and this does not apply to the ocean ships, as I am sure you know.

Q. Well, I would like to have you say why it doesn't apply. Why couldn't an ocean vessel, if it was not able to get through, tie up and stay in the Seaway system just as well as an inland ship? A. It could as far as the Seaway is concerned, except we don't think it would be good for our business.



*Robert John Burnside—Cross*

Q. Well, what's your business? A. Running the Seaway to forward the trade between our country and yours.

Q. How would it hurt your business to have an ocean-going vessel tie up as compared with an inland vessel? A. Would you repeat your question, please? Is it our [167] business you are talking about?

Q. You said it would hurt your business to have an ocean-going vessel tie up in the Seaway. I was asking how would the tying up of an ocean vessel hurt your business in view of the fact that you admitted the tying up of an inland vessel would not hurt your business? A. The confidence generally in the Seaway operation depends, I think, on a stable operation. That is to say, when people dispatch goods by a ship, they should have the expectation of its arriving at its destination in a reasonable period of time and goods held over the winter would not contribute, I think, to the general esteem in which the Seaway as a trade system was held if it were carried to any extent. This is involved in our endeavor to close the Seaway. It is one of our main difficulties.

Q. Well, do you think that it helps the esteem of the Seaway when four vessels are trapped there for four and a half months? A. We regret this very much.

Q. Now, do you get forecasts that cover several days in advance in your weather calculations?

The Court: Can we limit that question, Mr. Poor, to the period in question, 1964 and before that?

[168] Mr. Poor: Yes, I am talking about 1964 and before.

The Witness: Yes, we get the best reports that we can from our Weather Bureau. They are normally what we call a five-day forecast.

*Robert John Burnside—Cross*

*By Mr. Poor:*

Q. And do they show highs coming over Northwestern Canada to indicate colder on the way, and so forth?

A. They are generally coached in the terms of the temperature will be so much above or below normal. Very frequently they have, the normal is so and so.

Q. Well, in other words, don't they show the highs and the lows at all? A. That type of forecast is normally received by us in the papers and we depend on the experts interpreting the weather maps as to exactly what the temperature will be, the extremes of the temperature.

Q. Who are the experts that you depend on? A. The meteorological branch of the Department of Transport.

Q. Is that in Ottawa? A. Yes, that is the head office. Their branches are all over the country.

Q. Now, you were talking about upbound ships. Upbound [169] ships, as I understand it, means ships that are coming in from Montreal to the Lakes; is that correct?

A. That is correct.

Q. And delays to upbound ships don't necessarily affect downbound ships, isn't that so? A. If the upbound is in the lock, the downbound can't occupy it and if any ship is delayed in the position where it will interfere with the passage of the others, it is a delay for all.

Q. You have, then, the upbound and downbound ships occupy the same lock? A. The locks are single, with three exceptions. The normal way of operating is to have an upbound ship—let us say it's an upbound first—come into the lock; it exits upbound, after which a downbound ship comes in and uses the same lock and exits downbound.

Q. Did I understand you correctly that the capacity of the Seaway to handle ships is fifteen ships a day? A.

*Robert John Burnside—Cross*

The capacity of the area to which we were referring was the St. Lambert Lock. It's in that order. It depends so much on the number of ships and the size of the ships. You may possibly have a double lockage. If you have many ships, two lines to go in two at a time, of course, the capacity is [170] decreased but that is an average capacity. We exceed that at times but it depends on the speed, largely, of the ocean ships and so forth.

Q. Now, you testified that on the 5th of December, 1964, your office reviewed the situation. Now, who was it made that review besides yourself? A. Largely, Mr. MacKenzie. He is my special adviser. This is in the essence that we reviewed the reports coming in from our districts.

Q. And as I understand it, about noon you decided—you made some decision about closing the Seaway. A. That is correct.

Q. Do you remember what that decision was? A. It was that we would have to close very quickly, very soon; and at that time, it was worded to the effect that ships would not be permitted into the system. We were indicating some degree of imminent anxiety at that time.

Q. Well, I am interested only in the Iroquois Lock. A. Yes.

Q. And you, at that time, decided that at midnight on December 5th—that is midnight between December 5th and 6th—no more ships would be allowed to enter Iroquois Lock; is that correct? [171] A. That is correct. This occurred, I think, in the afternoon.

Q. What occurred in the afternoon? A. The decision was made in the afternoon to close at midnight, the entrance to the Iroquois Lock.

Q. Now, I understand——

*Robert John Burnside—Cross*

Mr. Van Emerik: Could we have a little more discrimination in the questioning? We are talking about upbound and downbound booth, or downbound only——

Mr. Poor: I am talking only about downbound.

*By Mr. Poor:*

Q. Now, I understand—I think it has been stipulated that at two p.m. a broadcast was sent out, stating that the Seaway would close as of midnight December 5. Is that in accordance with your recollection? A. I think no further ships were to be permitted to enter the system—essentially that is correct, yes.

Q. Now, how was that broadcast sent out? A. It was broadcast on the marine bands of the Department of Transport who are in touch with the shipping trade. They broadcast the weather and other news pertinent to the shippers. This was the most appropriate method that we could use to get a message quickly to the ships.

[172] Q. Would that broadcast be picked up by an ordinary radio receiver such as you have in your home? A. No.

Q. But it would be picked up by a ship's radio? A. It could be picked up by a ship's radio if they were listening to the band; yes, it's possible.

Q. You know, do you not, that ships are not allowed to have their radios open while they are in port? A. No, this is not—not to my knowledge.

Q. Now, you knew when you sent out this notice on December 5 that there were several ships which would not be able to reach Iroquois by midnight on December 5, didn't you? A. We couldn't see how you could possibly get there.

*Robert John Burnside—Cross*

This is something we had attempted to tell some days in advance.

Q. Well, if a vessel was in Lake Erie, that ten-hour notice that you gave would not be sufficient to enable her to reach Iroquois by midnight on December 5, would it? A. I would agree if you mean that the time for the ship would run out; I would agree.

Q. Now, you have testified that you gave Mr. MacKenzie instructions to telephone various people as to the risk of closing the Seaway on December 1st. That was the date when you gave the instructions to Mr. MacKenzie, is that right? [173] A. That is correct. They were given to Captain Butt and Mr. MacKenzie.

Q. You gave them to both? A. Yes, I did.

Q. Now, were those instructions in writing or were they simply oral instructions? A. They were oral instructions in the normal conduct of our business.

Q. Do you remember about how many people were telephoned to, how many firms? A. No, I don't remember of my own knowledge. I think the other gentlemen can answer that better than I can.

Q. Now, why couldn't you have sent telegrams rather than phoning? A. We consider that the spoken word is more effective to convey to the recipient the concern felt by the Seaway officials lest the ships be trapped in the Lakes, which was the essence of our message.

Q. Well, didn't you consider that on the telephone there is always chance for misunderstanding? A. We don't find it that way, sir.

Q. Now, isn't it true that the canal system at the Welland Canal is always open at least until December 15th and [174] sometimes later than December 15th? A. Normally, the Welland Canal is open until December 15th. It is further

*Robert John Burnside—Cross*

south. It is not nearly as affected by ice as the St. Lambert, the more northerly lock.

Q. Well, Lake Erie is comparatively warm water, isn't it? A. It depends what you are comparing it to. It is warmer than at St. Lambert, I would say. This is a pretty hard question.

Q. Isn't it true that navigation continues on Lake Erie and also on Lake Ontario until about December 15th? A. Yes. The Welland Canal itself will handle ships, normally, up until the 15th of December.

Q. And isn't it also true that there is a strong outgoing current in Montreal Harbor that runs as much as 6 knots? In other words, the water that runs through the canal system is continuously running out to sea and drawing its water from Lake Ontario? A. The discharge through the St. Lawrence River passes through the Port of Montreal. The discharge through our locks and in our reaches is comparatively slight current.

If I could attempt to answer your question as effectively [175] as I can, there is a distinction between the River and the canal reaches where the water tends to be quiet. There isn't much forward motion through the canal reaches. The water there is merely enough, normally, to supply the water for the operation of the locks. There is much less current there.

Q. Well, as soon as you lock out a vessel or as soon as a lock is opened on the seaward side, so to speak, the water must run out of that lock, doesn't it? A. The lock discharges to lower the ship.

Q. And doesn't that fact that you get water from Lake Ontario in the Seaway system tend to keep the water warmer than it otherwise would be? A. I am sure that this is the case.

*Robert John Burnside—Cross*

Q. That's all. That's the answer to the question.

Now, you were mentioning telegrams that you sent to the Shipping Federation of Canada which is in Montreal, as I understand it. A. They have their offices there, yes.

Q. Now, you had an exchange of telegrams in November with Eagle Ocean Transport, which is the general agent for the plaintiff in this case. Have you seen those telegrams? A. I have.

Q. Before you telegraphed Eagle Ocean, you sent a [176] telegram to the Hurum Shipping Company in Montreal asking for details of the movements of their vessels, and that is in paragraphs 15, 16 and 17 of our stipulation of facts; and Hurum telegraphed St. Lawrence Seaway Authorities, attention Mr. MacKenzie and said in that telegram, "Regarding Orient Merchant and Olau Gorm presently in Lakes contact our principals Orient Mid-East Lines New York."

Then you did. You sent a telegram on November 25, which is in paragraph 17 of the stipulation, and that telegram reads as follows: "In the best interests of all concerned we respectfully request ETA of ocean vessels for Seaway transit re approaching of the 1964 navigation season 1 ETA upbound St. Lambert Lock One 2 ETA downbound Port Colborne Lock Eight 3 ETA downbound Iroquois Lock Seven."

Now, this telegram was sent on November 25 and at that time, you were finding that the water at St. Lambert Lock was colder than it had been the preceding year. You didn't say anything about the colder water, though, in that telegram, did you? A. The purpose of the telegram was to obtain the ETAs of the ships. We were unable to get it from the Hurum Shipping, who advised us, as I recall it, that they were having difficulties with their principals and

*Robert John Burnside—Cross*

could we do anything about it; [177] and then sent us a telegram inviting us to contact them, which we did. The purpose of that telegram was to catch up the people from whom we had not heard with respect to their ships. The water temperature was not included in that telegram.

Q. That telegram didn't contain any warning, did it?

A. The implied warning was there, but there was no specific warning.

Q. I don't see how there is any implied warning simply to ask for the position of ships. A. This we have found, that when we ask for the position of late ships is in itself our first movement towards the correlating of the data.

Q. Now, then you received this reply on the same date from Orient Mid-East Lines, which is paragraph 17 of the stipulation: "Yours today ETAs 1 None 2 Olau Gorm seventh Orient Merchant sixth 3 Olau Gorm eighth Orient Merchant seventh. Respectfully request immediate advices event Authorities decide close sooner in order attempt alter arrangements."

Now, you never replied to that telegram, did you? A. There had been no decision taken at that time to close the canal sooner. We couldn't tell you. All we could [178] have said to you was we haven't decided.

Q. That, of course, may be true. But as a matter of fact, you never did reply to that telegram even when you commenced to feel that the Seaway would have to be closed?

A. That was one of the reasons that I arranged that they telephone you people to tell you the conditions, personally convey the message to you of our concern.

Q. Well, why should you have sent a telegram for the positions but then when it came to a warning, you relied on the telephone? A. We had received data with respect to all the ships as far as we were aware. No agent had called



*Robert John Burnside—Cross*

us other than the Hurum Shipping and said, to my knowledge, We can't get an ETA from these people. They are evasive, as I recall the inference. Can you do anything about it?

That was the reason we telegraphed. We replied to the telegram, in effect, by telephoning to you to stipulate the conditions that we saw and in effect convey to you our concern that you should get away.

The Court: Mr. Poor, is this a convenient point to take our luncheon recess?

Mr. Poor: Yes, Your Honor.

The Court: We will reconvene at 1:45.

(Whereupon, at 12:37 p.m., a recess was taken until 3:45 p.m. the same day.)

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[179] AFTERNOON SESSION  
(1:47 p.m.)

Whereupon, Robert John Burnside the witness on the stand at the recess, resumed the witness stand, was examined and testified further as follows:

*Cross-Examination (Resumed) by Mr. Poor:*

Q. Mr. Burnside, I believe you testified that you had asked the Montreal agent of the plaintiff here as to the ETAs on various vessels and they said that the plaintiff was being evasive about it. Now, was that said to you?  
A. This was the impression that I got from the various reports that came to me. The impression that I got that was conveyed to me was that somebody was not saying what the ETAs were. And to expand that just a little, I was concerned less somebody might have perhaps misunderstood the conditions, or there was something there that I didn't

*Robert John Burnside—Cross*

understand, and, therefore, it was of concern to me and that is one of the reasons why I specifically instructed Mr. MacKenzie to contact the New York office by telephone.

Q. Yes. Well, even before that you had sent a telegram directly to the New York office and the New York office had replied and asked you to advise if their ETA's [180] were suitable. A. This remark refers to the period before that telegram was sent. This was the impression that I was under before the telegram was sent, and this was also before the telephone message was sent.

Q. There is quite a difference in time between the time the telegram was sent on November 25, and when, you say, there was a telephone message on December 1st. There is a difference of six days.

Now, can you think of any reason why the plaintiff should be evasive in answering this question?

Mr. Van Emmerick: I object to asking the witness to speculate as to what was going on in somebody else's mind.

The Court: I think that is right. How would he know what is going on in somebody else's mind?

Mr. Poor: I don't know, but he is an expert—

The Court: He is not a mindreader, as I get it.

Mr. Poor: All right. Never mind.

*By Mr. Poor:*

Q. Anyhow, when you sent that telegram on the 25th, they immediately replied and gave you the ETAs. There was nothing evasive about that, was there? Was there anything [181] evasive in their reply on the same date?

A. No, I can't say that there was anything evasive other

*Robert John Burnside—Cross*

than the wording of the telegram itself asking for something that we couldn't do. The word, "evasive," does not apply to the telegram, that is correct, sir.

Q. Now, when you sent out these notices or these supposed telephone conversations, do you know if there was any telephone conversations with the representatives of the Flying Independent? A. I can't answer that to my own knowledge.

Q. And you don't remember if there were any conversations with the representatives of the Van Fu, I suppose? A. My impression is that there were, but my memory is very clear on the other matter. It is extremely clear. We having received this telegram, in some respect disturbed us because we couldn't answer it in detail. I felt it incumbent upon me to see that your office was contacted by telephone, and the matter made clear to you. We were more concerned for that reason.

Q. Do you think you telephoned only to one company? A. No, we telephoned to other companies. There was a general instruction that a company's whose movement showed some bunching or some late arrivals that were potentially [182] disturbing to us should be contacted and the situation made clear to them.

Q. These telephone messages were sent only to the ship owners or their authorized representatives themselves, I assume. Didn't you—you didn't try to telephone the masters of the ships? A. No.

Q. Do you have any written correspondence between yourself and the representatives of the Flying Independent? A. Not to my recollection.

Q. You haven't got it with you anyhow? A. No.

Q. How about the Van Fu? A. No, not in that connection.

*Robert John Burnside—Cross*

Q. Now, Mr. Pendias testified—and you were not in the courtroom at the time—that he did have a telephone conversation relating to these two ships on December 2 with one of the Seaway representatives. He believes it was Captain Butt.

Do you have any knowledge of any conversation—I am not asking about what the conversation was, but do you have any records that Mr. Pendias called your office on December 2nd? A. I have memoranda dealing with the situation that [183] refer to this matter, but I don't think I have anything that states whether A called B or B called A. I don't recall this.

Q. Well, do you have any memoranda as to any communication with Mr. Pendias of Eagle Ocean Transport on December 2? A. There is a memorandum, as I say, dealing generally with both conversations which I have in the files, yes.

Q. When you say you have it in the files, that means up at——A. I have copies here.

Q. I see. Now, do you know Mr. Nicholas A. Lyras who is, I believe, Vice President of Eagle Ocean Transport and who was up at the Seaway last fall? A. I know the gentleman in the second seat to the left. He appears to be the man. I believe there are two Lyrases, and I must admit I don't know which—I do know the gentleman sitting in the second seat there to the left.

Q. Yes. Do you remember any discussion with him as to——

The Court: Excuse me, Mr. Poor. Is Mr. Lyras going to be called as a witness?

Mr. Poor: It depends on——

*Robert John Burnside—Cross*

The Court: Then, I think he ought to be excluded. [184] We have a general rule on all witnesses.

Mr. Poor: Mr. Lyras, will you please step outside.

Mr. Van Emmerik: I would also like to know what time he is talking about now. Did he know him in 1964, or did he meet him just a day or so ago?

The Court: We have a general rule on witnesses, so he will be excluded from the courtroom.

(Prospective witness left the courtroom.)

*By Mr. Poor:*

Q. You didn't meet Mr. Lyras until December of 1966, did you, or November of 1966? A. I met him—well, it's in the last year sometime. I don't recall just when. He came to our office.

Q. Did you tell him that there was a sudden drop in temperature in the water either on December 4th or December 5th just prior to the closing of the seaway? A. I don't recall the conversation with Mr. Lyras in detail at all. As I recall, he said it was an effort to learn more of the seaway and to meet us. The discussions were limited, I would say. I talked with him at the office for a half an hour, or so. I don't recall.

Q. Well, was there in fact any sudden drop in the seaway in 1964 just prior to the closing date of December 5? [185] A. The ice began to form, as I recall it, on the 4th, if my recollection is correct, and that indicates a distinct drop in temperature. You can't measure the temperature of water after it freezes. It was 32 at about that time. It

*Robert John Burnside—Cross*

doesn't become anything else, really. It doesn't become 31 or 30; it goes into ice. So, any water temperatures that are shown there are still 32 or very close to it, so that there is not an exact drop in the temperature of water because it forms into ice at that time. The transference from water, or the change of character from water to ice was taking place at this time and this means a lot of heat in the water that becomes ice. That's why it becomes ice.

Q. If you make a hole in the ice and drop a thermometer through into the water—— A. You would still get 32, approximately.

Q. Now, we have stipulated here as to the last days on which vessels passed through the Seaway in 1962 and 1963. Does the fact that vessels passed through on those dates necessarily mean that the Seaway was closed on those dates? A. My recollection is that we were clearing the ships out of the system and that the condition of ice versus water was not so acute.

Q. In other words, do you think that a ship could have [186] gotten through even after the last vessel passed through? A. That is possible. You are referring to what year, sir?

Q. 1962 and '63. A. Marginally possible, I would say. One of the reasons that there were no more ocean ships went through was that we got the last one out. I am not trying to give you a clever answer, but there were no more ocean ships to clear.

Q. But if one ocean ship had been overlooked, she could have gotten through, very likely? A. I wouldn't be prepared to say that, the situation didn't arise. I couldn't say now.

Q. Now, would it have been possible for the Olau Gorm, which arrived at Iroquois, I think, on December 6, 1964, to have passed through Iroquois Lock at that time?

*Robert John Burnside—Cross*

Mr. Van Emmerik: The assumption is incorrect, Your Honor. She arrived December 7, 1964, at 1310.

*By Mr. Poor:*

Q. All right. Make it December 7th. A. Physically possible?

Q. Yes. A. Yes.

[187] Q. It could have passed through Iroquois.

Now, were any improvements to delay the freezing of the Seaway made between 1959 and 1954? A. We installed some air pipes which wouldn't exactly delay the freezing, they would assist us in dispersing of ice. There is a difference in the two. There were other improvements undertaken of more or less a minor nature between those years.

Q. I believe that the Canadian ship Humberdoc came downbound, passing St. Lambert on December 6. Was that in the evening?

Mr. Van Emmerik: The Humberdoc passed upbound at St. Lambert at 0330 on December 6 and Iroquois at 2015 on December 6.

*By Mr. Poor:*

Q. So, the Seaway remained open to that extent on those dates in 1964? A. We were dealing with the upbound shipping in the same manner as the downbound shipping. It was entered in and passed St. Lambert and was permitted to clear the system. We didn't close them in. The difficulty was at St. Lambert.

Q. Yes, I understand that.

Now, Mr. Van Emmerik, in some of his examination in [188] this case, has indicated that the Seaway had no con-

*Robert John Burnside—Cross*

cern with vessels other than to tell them that November 30th was the date when it was possible that the Seaway would close and they had to do everything on their own account from then on.

Is that the attitude of the Seaway?

Mr. Van Emmerik: I object, since it's not my attitude either.

Mr. Poor: Well, I will bring it out, Mr. Van Emmerik. You said something to that effect.

The Court: Well, I think his purposes pertained to just what the requirements of the Seaway are to passing vessels.

Are there any statutory or regulatory provisions that require you to give notice to ships of water temperature and so forth?

The Witness: None that I know of, Your Honor. We consider it as part of our duty to provide a system that is as excellent as we can financially provide and that we fit and maintain and operate it in the highest condition, again financially and practically as we can.

The Court: That is the mechanics of the operation?

The Witness: Yes.

The Court: But are you in any requirement by any [189] Government authority or compact between the United States and Canada, or any other statute to provide any information as to weather conditions or anything of that sort?

The Witness: No statute that I know of. We do it as——

The Court: It is a voluntary service.



*Robert John Burnside—Cross*

The witness: We do it. We consider it part of our business to deal with them as well as possible. There is no statutory regulation.

*By Mr. Poor:*

Q. Well, isn't it true that in order to make the Seaway a real Success, it is necessary that you provide steamship companies with information as to when the Seaway is likely to close as far as you know, and also try to prevent them from being trapped in the Lakes? A. We try to give the best forecasts that are available to us. We start by publishing the normal closing date which indicates a date beyond which we think you cannot, with safety stay. We cannot tell before hand. We have spoken with the officials of the weather department of the Department of Transport and have on many occasions asked them if they could give us a month's notice of approximately when the freeze-up is likely to occur so that shippers and others [190] can set their trade, set their trips. Then we go down to two weeks. And they said, Oh, no, we don't do this. We can't.

Well, can you give us a week? Well, no, we wouldn't. Can you give us a few days? Well, no, we can't. We will give you the temperatures.

I would say that my impression is that they are endeavoring to evolve a system whereby they can. We take water temperatures daily throughout the year in an attempt to assist them in evolving some sort of scale that will tell us ahead of time. If we could find some isolated lake that froze up two weeks ahead of the Seaway under the same climatic conditions that exist throughout the country, this would be something very fine for us all, but at the present time, we don't have this, and we do not have any reasonably

*Robert John Burnside—Cross*

accurate or sensible thing to say to the shipper, such as, This year it's going to freeze up on October 10th or November 30th, or December 5th, or any other specific date. This is something we wish we had, but it isn't there.

Q. You say you wanted an isolated lake. Aren't there any isolated lakes in Canada? A. There are plenty of lakes in Canada, but they don't seem to behave in the manner that we want.

[191] Q. Now, was the Seaway Authority criticized as far as, you know, because of these vessels being trapped in 1964?

The Court: What difference does that make? As far as I can see, the Seaway Authority owes no duty or any obligation to any of these shippers. They are on their own. What difference does it make if they were criticized, or not?

Mr. Poor: I can't agree. Whether they owe a statutory duty, or not, they admittedly have assumed a duty of notification. They have said they set out these—

The Court: They have no duty. They are doing it as a favor, as I understand it.

Are you under any duty to furnish information or to warn people?

The Witness: No. No duty whatever.

*By Mr. Poor:*

Q. Now, of course, you have talked about the date of November 30, but that is, as I understand it, your notification. You don't really tie yourself down to November 30 in any way, do you? You say the Seaway might close

*Robert John Burnside—Cross*

earlier than November 30 under certain conditions. A. It could so turn out if the weather was extremely severe.

[192] Q. Would it have been impossible for the Seaway to have allowed the Olau Gorm to pass through Iroquois the date when she arrived there in December of 1964? A. My recollection is that it would have been possible to pass through the Iroquois Lock, but to no purpose because she couldn't get on through and it is no safe place for that or any other ship to winter in that area of the Seaway. We have no facilities there suitable for it. Again, my recollection is that this particular item was discussed and the principles were advised that the best mooring probably would be in Hamilton or Toronto Harbor where she was less bothered by winter ice, would have shore facilities adequate and suitable for her, much better than we have. Part of that area of the Seaway is on water, water fluctuates. The contact with the shore is more limited. There are various reasons why it is not a suitable place to spend the winter.

Q. But other vessels, that is, what you call the inland vessels, have wintered in the Seaway, isn't that so? A. Some of the small ones may have wintered in the Seaway, but I don't recall any of the main ones that are wintering—as a normal thing, they don't do it. They winter in Toronto, Montreal. Like I said, at the moment I [193] don't recall, excepting in the early days before the Seaway existed, they were sometimes trapped and stayed in the canals.

Q. What do you call small? A. Well, it's the old canal I am speaking of—262 feet long, approximately, and approximately 44 foot depth.

Q. Would you know their dead weight? A. No, I don't recall that, sir.

Q. I see.

*Robert John Burnside—Redirect*

Mr. Poor: That is all of my cross-examination, Your Honor.

The Court: Any redirect?

Mr. Van Emmerik: Very brief, Your Honor.

*Redirect Examination by Mr. Van Emmerik:*

Q. Are there any statutes, regulations, or treaties which give the Seaway Authority the authority to order ships to clear the Lakes or Seaway? A. None to my knowledge.

Q. Referring now to the Humberdoc which the stipulation based on your records states cleared upbound at St. Lambert at 0330 on the 6th. Were there any other upbound vessels that tried to clear St. Lambert on the 6th?

[194] A. Yes. My memory is there were two in line to come through. They were upper lakers.

Q. Did they make it? A. No.

Q. What stopped them? A. Ice.

Q. Was it physically possible to get them through St. Lambert Lock? A. No, other than the reference I have made to the offer to discharge the lock, and this offer, we couldn't take.

Mr. Van Emmerik: No further redirect.

Thank you very much, sir.

(The witness left the stand.)

Mr. Van Emmerik: Is the witness excused, Your Honor?

The Court: Is there any reason to hold the witness?

Mr. Poor: I don't know of any reason.

The Court: Very well. You will be excused.

Mr. Van Emmerik: Mr. MacKenzie, please.

*Donald MacKenzie—Direct*

Whereupon, DONALD MACKENZIE called as a witness on behalf of the defense, having been [195] first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Van Emmerik:*

Q. Will you state your full name and home address for the record, sir? A. Donald MacKenzie, 129 Adolphus Street, Cornwall, Ontario.

Q. What is your present occupation, Mr. MacKenzie? A. Special Assistant to the Director of Operations, St. Lawrence Seaway.

Q. That is a Canadian Government organization? A. It is a Canadian Government organization.

Q. How long have you held that position, please? A. Roughly six years.

Q. Did you come on when the Seaway opened, the new Seaway? A. I was transferred from the Department of Transport.

Q. How long had you been with the Department of Transport, and in what capacity? A. Some 35 to 38 years.

Q. What sort of jobs did you hold with them during that time? A. Loading foreman, divert superintendent of the Welland Canal, Northern Regions, looking after the operations.

[196] Q. That is the job of the superintendent at the Welland? A. Yes, at the Welland.

Q. Did you continue this right up until the time you came with the Seaway? A. I came with the Seaway prior to the Seaway opening. I was transferred to the Seaway as general superintendent of operations.

Q. Was that before you became a special assistant to the Director? A. That is right. I was moved up from general superintendent to special assistant.

*Donald MacKenzie—Direct*

Q. Now, I am going to refer in the rest of my questioning to the closure of the Seaway in 1964 and particularly to the eventful trapping of the two ships here involved, the Olau Gorm and the Orient Merchant, in that month. I take it, at that time, you were special assistant to the Director? A. That is correct, sir.

Q. Will you give us a general view of your duties and responsibilities in connection just with the closing, please, starting when you feel the closing situation began to develop? [197] A. I would say the first part of the closing phase, I would be in consultation with my superior, Mr. Burnside, from time to time as to conditions within the lower part of the Seaway, the Montreal end in particular.

Q. Now, this is the St. Lambert end, is it not? A. St. Lambert, yes. This would be assessed very closely several times per day, also on weekends leading up to the closing. The number of ocean ships above St. Lambert would be checked out several times, then consultation. Ice thickness, air temperatures, water temperatures would be all checked out and discussed. From there on, it would be waiting for decisions for the next day to assess the same situation.

Q. Did you, in the course of the closing operations, have occasion to answer queries from the trade about the possible date of the closing? A. Yes, many queries from the trade regarding the possibility of getting out before the closing.

Q. In what form did these queries come? A. I would say mostly by telephone. Some by wire, but mostly telephone calls.

Q. Can you give us an idea of how many you would get in any given day, starting after the formal close of

*Donald MacKenzie—Direct*

the season, say, November 30th? [198] A. I would hazard a guess and say probably 35 to 40 calls.

Q. How about telegrams and TWXs, and the like? A. Probably five or six a day.

Q. Did there come a time during the closing spell that you were asked to get in touch with various vessel operators in and about the Great Lakes area? A. When I was asked to get in touch with them?

Q. Yes, sir. A. Not to my recollection, sir. I think Captain Butt was.

Q. Were you ever contracted by, say—well, let's get specific: Did anybody from Orient Mid-East Lines ever telephone you or get in touch with you in any other way to ask you about the closing? A. Yes, sir. I had a call from New York on December 2nd. The party on the other end of the line was identified to me as Mr. Pendas, asking me the conditions of the closing and advice as regards to clearing the subject ships. I emphatically stated the situation and that if these ships were mine, I would not want them farther away than Port Colborne and on their way down-bound at the time of the telephone call December 2nd.

[199] Q. Did he tell you at that time where his ships were? A. Yes. I would have to say, yes, he did.

Q. Do you recall what he told you in that connection? A. No, I do not.

Q. Is what you just stated as your advice to him an accurate quote of what you told him? A. As accurate as I can remember.

Q. Now, in connection with the closing, did you have an occasion to visit any of the Seaway areas to check on ice conditions or anything other than you might be checking on in your capacity? A. Yes. I was directed to go to St.

*Donald MacKenzie—Direct*

Lambert to look at the situation and report to my immediate supervisor, which I did, and consulted with the regional superintendent of operations and the assistant regional director. And the decision was reached that the situation was worsening and that there was a possibility that ships even then within the system between Iroquois and Montreal, or St. Lambert, might not be able to make the exit.

Q. Was that the purpose of your visit there, to determine whether or not the ships in the Seaway might make it out? A. That was the purpose of my visit, and also because [200] of upbound ships below St. Lambert, which we were concerned about damaging the gates due to ice, these ships were turned back to Montreal Harbor.

Q. What day did you leave to go to St. Lambert? A. On the afternoon of December 5.

Q. Which was a Saturday, correct? A. That was a Saturday.

Q. When did you return from St. Lambert? A. Sometime Sunday evening.

Q. That would be the day after, December 6th? A. Yes.

Q. And were you generally available in the St. Lambert area between those times? A. I would be in the St. Lambert Lock area probably until around ten or eleven o'clock at night, and I would be back there again at daylight, and I would be available by phone from the superintendent of the area to my motel.

Q. When you returned at daylight on the 6th, Sunday, did you determine for yourself that it would be physically impossible for ships to get through St. Lambert Lock? A. Not by myself, but in consultation with the regional people.

Q. Were you yourself satisfied that that was the case? [201] A. Definitely.



*Donald MacKenzie—Direct*

Q. Did you report that to Mr. Burnside? A. Yes.

Q. Will you tell us some of the other reports you made to Mr. Burnside on this visit? A. I would report to Mr. Burnside the ice condition forming in the locks and immediate area; the ice load, as it is referred to, inside what we call our single-skinned gates which was building up very rapidly to what was considered a very dangerous point.

Q. Is this ice that actually forms on the gate structure? A. It may form in the water itself, partly on the gate structure and it is built up by, let me say, elimination of pieces being pushed in and pushed into the gate.

Q. During this telephone conversation with Mr. Pendias on the 2nd, did you give Mr. Pendias any advice that his ETAs of the 7th and 8th would be permissible ETAs? A. Definitely not.

Q. Was this subject discussed at all? A. Definitely not.

Q. Did Mr. Pendias state to you, or give you any idea of what action he might take on your advice? [202] A. No.

Q. Can you think of any other matters discussed during that telephone conversation other than what you have just told us about? A. No, I cannot. It was made quite short and clear that here was a situation and if they were my ships, I would want them at Port Colborne on the way down at that time.

Q. Is this the same advice that you gave others? A. Yes.

Q. You put them in just about the same terms? A. Just about the same terms.

Mr. Van Emmerik: No further direct examination, Your Honor.

*Donald MacKenzie—Cross*  
*Captain John McLeod Butt—Direct*

*Cross Examination by Mr. Poor:*

Q. Do you remember having any off-the-record conversation with Mr. Pendias? Did he say to you at one time, "Just tell me off the record about this ice situation." Do you remember his using words to that effect? A. From Mr. Pendias to me?

Q. Yes. A. No, sir.

Mr Poor: I have no further questions.

[203] The Court: Thank you, Mr. MacKenzie.

(The witness left the stand.)

Mr. Van Emmerik: I will call my next witness, if I may.

The Court: Certainly.

Mr. Van Emmerik: This witness is excused also, Your Honor?

The Court: Surely.

Mr. Van Emmerik: Captain Butt, please.

Whereupon, JOHN MCLEOD BUTT called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Van Emmerik:*

Q. Will you state your full name and home address for the record, please, Captain? A. John McLeod Butt, 1105 Queen Street, Cornwall, Ontario.

Q. What is your present occupation, or position, Captain? A. I am Senior Ship Inspector of the St. Lawrence Seaway Authority.

*Captain John McLeod Butt—Direct*

[204] Q. Do you operate under the operations of the Seaway Authority? A. Yes.

Q. And you are under Mr. Burnside's direction? A. Yes.

Q. Was that the position you occupied in December of 1964? A. It was, yes.

Q. How long had you been in that position? A. In 1964, I had been there four years.

Q. What were you before that? A. Before that I was Marine Superintendent for a construction company working on the construction of the St. Lawrence Seaway.

Q. You built it and then you manned it? A. Right.

Q. How long have you been in the business of canal affairs, whether constructing or operating them? A. Well, since 1955.

Q. And what did you do before that? A. Before that I was at sea, and I came to Canada in 1953. I went to sea when I was 16. While I was at sea, I was a pilot and various other jobs. I have been in all [205] kinds of maritime fields since I was 16.

Q. How many years would that be since you went to sea, Captain? A. About 49 now.

Q. Now, Captain, I am going to bring you right up to the time of December 1964 and that time span which includes closing up the Seaway for the end of the season 1964. I am going to ask you what your particular occupation and concern was during the closing days, and you will have to start and tell us when these closing days began as far as you are concerned and take us through. A. Well, shortly after the beginning of November, it was the policy to carefully assess the number of ships that were up in the Seaway, how many were going out and how many were coming in. We kept a very, very close check on this

*Captain John McLeod Butt—Direct*

short of thing. About November 25th, we started issuing notices, telegrams to the Marine Association and the Shipping Federation, giving the number of ships, the course of ships in the Lakes above St. Lambert, the temperature of the water, temperature of the water the year before.

Q. Did you have as part of your job to contact, by whatever means, representatives of the various steamships that were using the Lakes and Seaway at that time? [206]

A. Yes, I did. As the season was drawing to a close, we asked for expected time of arrivals at Port Colborne, Welland Canal and Iroquois; and it was the policy at that time to keep a very close check and it was a normal thing to call the agencies in Montreal and ask them if they had any further news from their ships, in other words, the ETAs being advised, if something happened that was going to hold any of them back or anything like that.

Q. Did you call anybody in Montreal with respect to the plaintiff here and its two ships, the Orient Merchant and Olau Gorm? A. Yes.

Q. Who did you call? A. I called Hurum Shipping.

Q. What information, if any, did you exchange with Hurum? A. Well, I asked—I spoke with Mr. Mittet and——

Mr. Poor: Your Honor, I object to testimony as to calls between the Seaway and Hurum, because no connection is shown in this case between Hurum and the plaintiff. Hurum was a Montreal agent, but its agency was limited to Montreal.

Mr. Van Emmerik: That is testimony, Your Honor.

[207] Mr. Poor: I think that has been shown already.

The Court: What is the stipulated fact?

*Captain John McLeod Butt—Direct*

Mr. Van Emmerik: The stipulated fact is that Hurum was their agent in Montreal. There are no limiting or qualifying phrases used.

The Court: That is Paragraph 15, Mr. Van Emmerik.

Mr. Van Emmerik: Yes. I wish I knew that stipulation as well, Your Honor.

The Court: It is characterized in here that they are agents in Canada.

Mr. Poor: In Canada, yes, but not in New York.

The Court: That is just the location of the agency. I will permit it. Go ahead. You will have your exception.

Mr. Van Emmerik: If it makes any difference, I know and will agree that Hurum was not responsible for sailing the ships.

The Court: I still think the conversation is relevant.

Mr. Van Emmerik: Yes, sir.

*By Mr. Van Emmerik:*

Q. Would you state what you and Mr. Mittet discussed in the telephone conversations? A. I asked Mr. Mittet if he had any further knowledge [208] of the ships he was agency for and the ones that we were plainly interested in were the Orient Merchant and Olau Gorm; and he told me that I would be better, or the Seaway would be better to contact this company directly in New York, because he had not been able to convey the urgency of the matter to them, or he didn't wish to do so. He asked that we contact them directly.

Q. Do you recall what date this conversation took place, or if it was on more than one date, so state? A. Well, I

*Captain John McLeod Butt—Direct*

called Hurum on several dates. I can't recall exactly this particular one. It is a matter of record, I think. I do know that it was December 1st when I made the first call to New York.

Q. To New York.

Mr. Poor: To Hurum.

*By Mr. Van Emmerik:*

Q. To Hurum, or to New York? A. New York.

Q. When you say you called New York on December 1, who did you call in New York? A. Mr. Pendias, as far as I know.

Q. Did he identify himself as Mr. Pendias? A. Yes, sir.

[209] Q. Will you tell us what you told him? A. I told him the position, the weather was deteriorating, the large number of ships still up in the Lakes and on instructions from Mr. Burnside I explained that we were getting concerned with his position and he was strongly advised to get his ships on the move to get out of the Seaway.

Q. Did he discuss with you at that time anything concerning the Flying Independent? A. Yes, he explained his position. I understand it was a quite grave position for him. Having been in the shipping business myself, I can fully appreciate his problem. He had ships up there and he explained they—the cargo and he also explained that the weather was against them, and so on. He also mentioned the Flying Independent who was, of course, experiencing the same type of weather in the Lakes.

Q. Did he say anything about the Flying Independent? A. Well, he mentioned that the Flying Independent, he understood—that—this was in general conversation—he

*Captain John McLeod Butt—Cross*

gave me the story of what's happening and he understood that the Flying Independent was also going to be late. I merely repeated that there was nothing that we could do about that and the weather conditions were such that we were concerned and that if he was wise, he would heed our warning.

[210] Q. Were you in Mr. MacKenzie's office on December 2nd when he had a telephone call from Mr. Pendias?

A. Yes, I was there.

Q. Did you overhear Mr. MacKenzie's end of the conversation? A. Yes, sir.

Q. Can you tell us what was said on this end of that conversation? A. Mr. Mackenzie outlined the same conditions that had been prevalent for several days, deteriorating weather, and the concern that we had for the number of ships in the Lakes. We were concerned that we would get them all out.

What Mr. Pendias said, of course, I don't know. But I know Mr. MacKenzie, after several minutes, after explaining the position the same as I had done the previous day, he said, "If these ships were under my jurisdiction, I would get them out of there"—or words to that effect.

Mr. Poor: What was the last part?

Mr. Van Emmerik: "Or words to that effect."

No further direct, Your Honor.

*Cross-Examination by Mr. Poor.*

Q. Did you at any time try to communicate with the [211] operators of the Flying Independent? A. No, sir, not directly. I contacted their agency in Montreal in the same manner that I had for many others.

*Captain John McLeod Butt—Cross*

Q. Do you remember who their agents were? A. Yes. Their agency in Montreal was Watts, Watts & Company.

Q. Then, you say that you called the Orient Mid-East, or talked to Mr. Pendas, on December 1st, sir? A. That is right.

Q. Did the Seaway pay for that call? A. Yes, they did.

Q. Have you any evidence in the form of a bill from the telephone company to show that that call was made?

A. I wouldn't know that, sir. I have nothing to do with the administration. At this particular time we have hundreds of calls we make and hundreds of calls we accept.

Q. Don't the telephone companies in Canada send you bills which show that you called on a certain date? A. They do for a private individual, but what they do for a company, sir, I couldn't tell you.

Q. Now, on December 2nd, you said that you were present when Mr. MacKenzie was talking to somebody in New York. How did you know that he was talking to Mr. Pendas? [212] A. Well, it was just one of those coincidences, I expect. Mr. MacKenzie's office is two floors above mine and I happened to go up and see Mr. MacKenzie. I happened to be in his office when the telephone rang and his secretary, I think it was, said Mr. Pendas was on the line. I remember the name very well. Whether she got this from the operator, or not, I don't know. But Mr. MacKenzie was in the habit of asking, "To whom am I speaking?" and he would repeat it. If the man said, "This is Mr. Pendas," he would normally repeat the name.

Q. Now, you didn't have any talk with Mr. Pendas yourself at all? A. I did.

Q. On December 2nd? A. On the 1st. I didn't talk to him on this particular day that Mr. MacKenzie talked to him; no. I didn't talk to him. I talked to him on the 1st.



*Captain John McLeod Butt—Cross*

Q. But on the 2nd, you had no talk with him? A. No.

Q. Let me ask you this: Did at any time Mr. Pendias say to you, "Just tell me off the record whether the ETAs in my telegram are safe or not"? A. I can't recall exactly how it went on. I know [213] Mr. Pendias explained his situation very thoroughly, and I explained to him that although I appreciated his problems, our problems were the ships that were in the Seaway and we had to get them out, the weather was deteriorating and there was nothing we could possibly do about that.

Q. But you have no record of your call of December 1st except your own recollection, is that right? A. That is right.

Q. Did Mr. Burnside give you any written instructions as to calling people? A. Mr. Burnside was very, very busy with the closing, the same as we all were, and there were many instructions given without written authority, or anything.

Q. Did you get in touch with the agents of the Flying Independent on December 1st? A. I don't think so. No, I had talked to Watts, Watts agency and I was assured by them that to the best of their knowledge, everything was being done to get the Flying Independent out.

Q. Was anything said to you about the Flying Independent carrying military cargo? A. No, sir. I wasn't concerned with cargos.

Q. Now, how about the Van Fu?

[214] Did you get in touch with the Van Fu? A. Yes, I did.

Q. Who were they? A. The agency was Colley Motor Ships in Montreal.

Q. Was that on December 1st A. I probably talked to them at that time as well. I talked to them previously. I

*Captain John McLeod Butt—Cross*

talked to many of them and I know that I talked to a few on December 1st.

Q. But you have no record of these calls? A. No, sir.

Q. Either to New York or to Montreal? A. No, sir.

Q. Will you see if you can obtain a copy of that telephone bill covering December 1st showing your calls?

Mr. Van Emmerik: I object. There has been no showing that there is such a bill. If there is, the Government will undertake to show it.

The Court: How long are we going to have to keep the record open?

Mr. Van Emmerik: I might say that I have canvassed this possibility because I knew perfectly well this question would be asked and we haven't found any yet. We will continue efforts to find any such bills. If they exist, we will [215] produce them, if the Court deems it relevant.

Mr. Poor: Well, I am willing to take your statement that you looked for it and can't find it. That is an indication that it doesn't exist.

The Court: Who would know whether such bills were rendered or whether they weren't rendered?

The Witness: This is an administrative question and I presume the telephone operator would keep a record. We have tried, I know, to find records, but at this time, there are so many calls being made that there is no record that we can find of it.

The Court: I don't know what a record would indicate except a call from Montreal to New York, whatever it was. What would the bill indicate?

Mr. Poor: The record should indicate that on December 1st, they called a specific number in New

*Colloquy*

York and length of time. We have such a telephone record showing our call to the Seaway on December 2nd. But if it is admitted that such a call took place, then, of course, there is no particular point in producing it.

The Court: Mr. Burnside, do you know anything about the administration as far as telephone calls are concerned? You are under oath still.

[216] Mr. Burnside: We have canvassed the situation with respect to our records and we found none except for one sheet and strangely enough, this sheet shows a communication between our office and yours in New York on the 1st of December, but it is listed as MacKenzie to Lyras. This recollection is not in our minds, but there is one sheet, the only sheet that we could find and it's a sort of marvel it has not been destroyed, because it isn't a bill. We couldn't locate any of them. We hope to be able to produce it. The efficiency in the office is enormous and they won't keep them around after the dust settles. Presumably, they were destroyed.

The Court: I guess that will have to be the state of the record, Mr. Poor. There is no record available for the time being.

Mr. Poor: It has been destroyed, apparently.

I wonder if the telephone company records have been destroyed.

The Court: The only thing I could suggest is that you issue a subpoena for them and try to find out.

Mr. Van Emmerik: It seems to me to be great lengths to go to for one piece of impeaching evidence.

*Colloquy*

Mr. Poor: Well, the whole point is Mr. Burnside [217] said that the only record they had was a telephone call on December 1st to Mr. Lyras. Now, Mr. Butt says he talked to Mr. Pendas. That is two different people, and I don't know—Mr. Lyras doesn't say that he had no telephone call on December 1st.

The Court: Well, Mr. Lyras hasn't taken the witness stand yet.

Mr. Poor: He is out of the courtroom as present. I don't know whether you would want to have him called right now, or whether you prefer to wait.

The Court: Let's take it in the regular order. But I don't know what to do about these records, unless you want to try and get subpoenas issued to the telephone companies in Canada, or something like that. That is going to hold the record open a long time.

Mr. Poor: Well, of course, our only point is the testimony is that the Seaway was very busy at the time, and it's quite possible there may have been some confusion in these calls. Of course, there was a call on December 2nd. Everybody agrees to that one; as to what was said is the disagreement as to that.

On this December 1st call, we say we never received it and it's quite possible that the witness may have decided [218] afterwards that he did make it, whereas, he did not in fact make it.

The Court: I don't know what to do for you, Mr. Poor. If the records have been destroyed, they can't produce them. If you think the telephone

*Colloquy*

company has them, I suggest you subpoena the records.

Mr. Poor: We can't issue a subpoena up in Canada. The Government has been able to get all these witnesses from the Seaway to come down. I imagine they could also prevail upon the Canadian Telephone Company——

The Court: Well, I don't think you can throw the burden on the Government to produce your impeaching testimony if you think you have impeaching testimony. That burden is on you.

Mr. Poor: Well, we will let it stand as it is, then.

Mr. Van Emmerik: Shall I call my next witness, Your Honor?

The Court: Are we through with this witness?

Mr. Poor: I think it is still open to us that this witness is mistaken about his call.

The Court: I think you can argue that very well, Mr. Poor, but I have to take the testimony as it comes and [219] give it what I think is the proper weight. That is all I can do. If there is a contradiction in the testimony, I have to try to resolve the contradiction. I have to believe somebody.

Are we through with this witness?

Mr. Poor: Yes, Your Honor.

Mr. Van Emmerik: I am, Your Honor.

The Court: Then, let's take a short recess before proceeding with the next witness.

(Whereupon, at 3:13 p.m., a recess was taken.)

Mr. Van Emmerik: Before proceeding with my next witness, Your Honor—I have not told the three

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Canadian people that they may go—unless Your Honor has any questions about Expo '67, or anything, may they take their plane home?

The Court: Is there any reason why they shouldn't?

Mr. Poor: I have no objection.

Could Mr. Lyras come back in the courtroom now? He was only excused because he might contradict the Canadian witnesses, and there aren't any more.

Mr. Van Emmerik: No, sir.

The Court: Thank you, gentlemen. Have a good trip home.

Thank you, Your Honor.

[220] (Whereupon, the witnesses left the courtroom.)

Mr. Poor: Your Honor, I would like to have the cross-examination of the next witness handled by Mr. Sher here. This is a question of warehousing and he is familiar with it, whereas, I am not.

The Court: Very well.

Mr. Van Emmerik: Mr. McGannon, please.

Whereupon, WILLIAM A. MCGANNON called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Van Emmerik:*

Q. Will you state your full name and address for the record, please, Mr. McGannon? A. Willian A. McGannon, 4380 Brookside Avenue, Apartment 112, Minneapolis Minnesota.

*William A. McGannon—Direct*

Q. What is your present position, Mr. McGannon? A. I am assistant to the director of the Commodity Office in Minneapolis, United States Department of Agriculture, ASCS, CCC.

Q. CCC is Commodity Credit Corporation? A. Commodity Credit Corporation.

[221] Q. ASCS is—— A. Agricultural Stabilization Conservation Service.

Q. Thank you.

Would you describe your duties in that office at present? A. At the present time, in addition to the special jobs as director assigned to me, I am still the contracting officer contracting for space and storage of surplus commodities.

Q. Surplus commodities such as are involved in this case? A. Such as butter, cheese, dry milk, canned meat, frozen meats, anything that becomes surplus under the needs of the Welfare Agencies or the Foreign Aid Program.

Q. Just for clarity's sake, this case involves relief cargos carried through CARE, Church World Service, Lutheran World Relief and Seventh Day Adventist, which was flour, grain, bulgar wheat, dry milk and that sort of thing, is there any doubt that this is the sort of cargo that you are talking about that you handle? A. That is right.

Q. Now, we are here concerned with a freight claim by Orient Mid-East Lines as owner of the Orient Merchant and the Olau Gorm. Did you, as part of your present job, or [222] any earlier job, ever have occasion to deal directly with cargos off the Orient Merchant? A. In the spring of 1965 after the Orient Merchant had struck rock going through the Welland Canal and it became necessary for us to unload the cargo and store it, reconditioning that which would be suitable for human consumption and disposing

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of the balance of it. It was necessary that I and another individual go to Toronto to arrange for storage space.

Q. And did you go to Toronto to arrange for storage space? A. I spent in excess of two weeks up there.

Q. Did you enter into any contracts for storage space in the Toronto area? A. I did. I entered into a contract with four: The Toronto Harbor Commission, the Mutual Warehouse, the Terminal Warehouse and the Intercontinental Warehouse; and also one at Buffalo, the Pittston Stevedoring.

Q. Were you the contracting office on these contracts? A. Yes, I was.

Q. Did you negotiate all the rates thereunder? A. Yes, I did.

Q. Will you tell us, please—I withdraw that.

[223] Did you in the course of such negotiations, particularly with the Toronto Harbor Commissioners, become familiar with that tariffs? A. Yes, sir.

Q. Did you become familiar with the demurrage terms for cargo at the Port of Toronto under that tariff? A. Yes, sir.

Q. Will you state for us what the meaning of "demurrage" is with respect to a tariff like that?

Mr. Sher: I object, Your Honor. I think the tariff speaks for itself. I don't see where he is qualified to interpret the Toronto Harbor Commissioners' tariff.

The Court: I think he is qualified to tell us what demurrage is, what it means in the contract, that is all he is asking for.

The Witness: Demurrage in the case of a pier storage is comparable to demurrage that you pay for



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the use of a car beyond the free time. It's set up in such a way as to entice the people to remove their commodity from the pier as rapidly as possible; and if they do not, it is set up in such a way that it acts more or less as a penalty.

By Mr. Van Emmerik: Did you in the course of off loading the distressed Orient Merchant cargo incur such a demurrage charge?

[224] A. No, sir.

Q. Was there a reason why you did not? A. Because I negotiated with the Toronto Harbour Commission for a regular storage rate on a hundredweight basis on a monthly basis.

Q. Will you tell us what rate you negotiated with the Toronto Harbour people for storage of the grain? A. Five cents a hundredweight.

Q. For what period of time? A. On a monthly basis for a period of whatever time we moved it from the ships tackle onto the pier. I don't have those dates in my mind right offhand.

Q. Now, there were four other contracts entered into, as you just stated. Will you give us the rates under those contracts? A. The Pittston Stevedoring at Buffalo was five cents.

Q. Now, when you say "five cents,"—— A. Five cents per hundredweight per month.

The rate at Mutual and Intercontinental was eight cent per hundredweight per month.

The rate at the Terminal—may I check a note in my pocket, please?

Q. Yes, you may. [225] A. That is eight cents also per hundredweight per month.

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Q. Were those the rates actually paid, so far as you know? A. They were paid, yes, sir.

Q. Now, in December of 1964, will you please state first of all what your position was? A. I was chief of the storage management division at the same Minneapolis office. My responsibilities in addition to the contracting for storage was the guidance of a team of warehouse examiners to make original examinations and subsequent examinations of warehouses proposed to store the surplus commodities throughout the entire United States.

Q. Did you in that capacity have occasion to inquire in connection with the freeze-in of the Orient Merchant and the Olau Gorm into available free warehouse space in the Toronto area? A. Not particularly in the fall of 1964, but in the early spring, January-February, I did have that occasion.

Q. Of 1965? A. Of 1965. We had a man in the area there and it is my feeling that provided we could have assured them that we would move the merchandise from the piers by April 15,

\* \* \*

[229] A. No, sir.

Q. In other words, you believe the plaintiff did perform a valuable service in storing the cargo over the winter? A. Oh, yes, I do.

Q. Did you have any occasion to go to Toronto at the time the cargo was being stored on those two vessels over the winter of 1964-65? A. No, but I had a representative there. I had a warehouse examiner.

Q. And what was his name? A. Henry Reich. I also had a representative from the consumer and marketing service, a grain specialist and a representative from the

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consumer and maketing service, a dairy commodity specialist.

Q. Now, when Mr. Reich came back from his inspection tour, did he make a report to you? A. Yes, he did.

Q. This report has been stipulated into evidence; it is Exhibit "N" and I would like to show it to you. It is dated February 18, 1965.

Would you read the last sentence? A. "In full agreement with Messrs. Berger and Linde.

\* \* \*

[255] Bay and down in the Bay of Takoma.

The Court: These were all Government ships.

The Witness: These were all mothball ships and we put the grain in; and, of course, there we had to pay for our own services.

The Court: Did we store for anybody else on those ships?

The Witness: We paid our own bills for the fumigation, ventilation, et cetera, et cetera.

Mr. Van Emmerik: The only comment I have—I have just mentioned it to Mr. Poor and I don't know what his rejoinder would be—this is an admiralty case and it is not unusual, particularly in collision cases, to try liability first and damages second. We have tried it all at once, and I certainly don't know what Your Honor's desires are in this direction.

The Court: I have let you run your own case and you mixed it all up. We have had both liability and damages.

Mr. Van Emmerik: Yes. But we might brief liability first and brief damages second, if liability is found.

*Colloquy*

It is not customary to go into the damage question in an admiralty case until liability is found.

[256] The Court: I know; like most negligence cases.

Mr. Van Emmerik: Yes, sir. And if there is going to be a question of liability, you know where I stand on that. It may not be worth their while to go after it if there is no liability. This looks like it is going to be a troublesome question. I only throw it out and I really don't care. I am not anxious to start briefing damages.

The Court: Where do we stand in this case now? Is this the end of your case?

Mr. Van Emmerik: This is the end of my case. I understand I have nothing to read in from the stipulation of facts because it is in; the deposition is in. I have no more witnesses, nothing more.

The Court: Do you have any rebuttal case, Mr. Poor?

Mr. Poor: Your Honor, we don't think it is necessary to have any rebuttal. The only rebuttal that we would have would be Mr. Pendias. Of course, there is a conflict of testimony as to whether there was any telephone conversation on the date of December 1st. He had already testified there wasn't any telephone conversation with Captain Butt and I could call him on rebuttal, and all he would say was there was no telephone conversation on December 1st. It would simply be reiterating what he said yesterday, so I don't think it really is necessary.

[257] Then, of course, it is admitted there was a telephone conversation on December 2nd, and there is a difference in recollection as to what was said

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on December 2nd, and Mr. Pendias would stick to what he said yesterday. I don't see any point in recalling him to rebut unless Your Honor wishes to ask him some questions.

Then, the trial, I would say, is completed.

Mr. Van Emmerik: Your Honor, may I jump in here for just a moment? Mr. McGannon has a plane to catch and a hotel to check out of. If he could be excused, I know he would like to leave.

The Court: If no one has any further questions, Mr. McGannon may be excused.

Mr. Poor: No objection.

The Witness: Thank you, Your Honor.

(The witness left the stand.)

The Court: Now, where does this leave us, gentlemen. Do you want to argue the case?

Mr. Poor: We thought it would be better to do it in the form of briefs after the testimony is typed.

The Court: All right. Then, why don't we keep the case open until you get the transcript of the testimony and then you can brief me, number one, on the question of [258] liability. And after that is decided and I decide that is liability, I can ask for further briefing on the question of damages.

Mr. Van Emmerik: Is there any need to keep the record open on liability? I think that case is all in, unless I lost track of something. In other words, we can proceed immediately to brief liability.

The Court: I would think so. I don't recall anything that hasn't been ruled on.

*Colloquy*

Mr. Poor: No, I don't think there is.

The Court: As soon as you get the transcript—  
How long will it take for you to prepare the transcript?

Mr. Van Emmerik: Your Honor, it has just been noted that we have telephone records to be gotten from somewhere.

Mr. Poor: Are you getting them?

Mr. Van Emmerik: Not by me. We have been through this already.

Mr. Sher: Well, the point is the telephone records will be in or out by the time the transcript is prepared.

Mr. Van Emmerik: All right. There may be delays——

The Court: We will simply have to play it by ear. [259] For the time being, let's just say the case is under advisement. The record is open for the telephone records, if they are available. In the meantime, as soon as you get the record, you can start preparing a brief on liability. I don't imagine you want to argue it orally if you are going to prepare briefs.

Mr. Poor: No, I don't think so.

The Court: Then, we will take from there. I will give you my decision on liability and you can take it from there.

Mr. Van Emmerik: How long after receiving the transcript should the briefs be in?

The Court: I haven't read your brief, but I notice it is pretty well briefed already.

Mr. Van Emmerik: Maybe we can tailor it down to the case as it developed.

*Colloquy*

Does Your Honor want briefs first from the plaintiffs, then the defendant and reply; or do you want simultaneous briefs, or how does Your Honor wish it?

The Court: I would think in view of what you have already submitted that you give me simultaneous briefs. It seems to me it is pretty well briefed already.

Mr. Poor: Yes. Of course, we didn't have the

273a

**Plaintiff's Trial Exhibit 1**

[Letterhead of]

**UNICEF**

**UNITED NATIONS CHILDREN'S FUND  
FONDS DES NATIONS UNIES POUR L'ENFANCE  
United Nations, New York**

11 November 1964

Orient Mid-East Lines  
c/o Eagle Ocean Transport, Inc.  
29 Broadway  
New York, New York 10006  
Attention: Mr. J. Mulara

Gentlemen:

For good order's sake we confirm yesterday's telephone conversation, when you committed yourself to acceptance of cargo on 27 November in Milwaukee, and requested as much additional milk as possible for Djakarta.

We were able to order out for that date a further quantity of 400,000 lbs. net—about 182 tons gross.

Very truly yours,

T. ADAMOWSKI  
T. Adamowski  
Chief  
Shipping Section

cc: Ray C. Fischer Company, Milwaukee



## Plaintiff's Trial Exhibit 2

NOT NEGOTIABLE

*Underwriters policy(ies) or certificate(s) will be duly issued.*

No. 76733

NEW YORK 5, N. Y.  
November 16, 1964

To EAGLE OCEAN TRANSPORT, INC.

*Advice of Insurance effected through*  
FRANK B. HALL & CO., INC.

67 WALL STREET

INSURANCE BROKERS AND AVERAGE ADJUSTERS

Assured:

Orient Mid-East Lines and Eagle Ocean Transport, Inc., G.A.

Loss, if any, payable to Assureds, as interest may appear, or order.

\$55,000.

"ORIENT MERCHANT"

Rate: 3%

## ON INTEREST

This insurance is to indemnify the Assured up to \$55,000. for the actual costs and expenses voluntarily incurred by the assured for reforwarding such cargoes which they are unable to load at Great Lakes ports by reason of the vessel being delayed and thereby being forced to discontinue loading operations within the Great Lakes by reason of the announced closing date of the St. Lawrence Seaway solely by reason of:

- a) an accident or occurrence involving the insured vessel which would constitute a claim under the American Institute Time (Hulls Form (amended to pay claims irrespective of percentage and to include Liner Negligence Clause) and/or breakdown of the insured vessel's engines and/or machinery including her loading and/or discharging machinery and/or equipment and/or auxiliaries and/or by loss of her propellor and/or rudder.

This insurance is warranted free of capture, seizure, arrest, restraint or detention etc. damage by strikers, etc. as per Underwriters and/or Companies and/or Associations clauses.

By acceptance of this Cover Note the interests named herein agree that, upon default in payment of any premium or any installment thereof when due, Frank B. Hall & Co., Inc. are authorized by them to cancel this insurance; also that all losses and/or claims under these and/or any other policies effected and/or payable in whole or in part to the same interests on this or any other properties shall first be payable to Frank B. Hall & Co., Inc., New York to the extent of all indebtedness then due and unpaid to them.

*Plaintiff's Trial Exhibit 2*

b) slow steaming due to heavy weather.

-continued as attached-

Attachment to Cover Note 76733

November 16, 1964

c) Delay in loading or discharging due to inclement weather or by reason of port congestion resulting from inclement weather.

d) Loss of or damage to loading and/or unloading and/or bunkering equipment at loading and/or discharging and/or bunkering ports and/or fire howsoever and wheresoever arising.

*In accordance with your instructions those insurances have been affected abroad through correspondent brokers, subject to foreign law and custom, with Underwriters and/or Companies and/or Associations who may or may not be doing business in and/or suable in the United States.*

FRANK B. HALL & CO., INC.

per W. A. Bennett

Brokers for Assured

e) Delay in transiting any canal or seaway due to such canal or seaway having become blocked or navigation therein impeded by an accident involving another vessel or vessels and/or by damage of whatsoever nature to such canal or seaway and/or by ice.

f) Delay by reason of shortage or non-availability of shore labor due to port congestion

Subject to Service of suite Clause (U. S. A.)—attached

Insured with Underwriters at Lloyds and British Companies through Sedgwick, Collins & Co., Ltd.

*Plaintiff's Trial Exhibit 2*

## NOTE

Underwriters' acceptance of risk was predicated upon the following contemplated itinerary:

ETD — Baltimore	November 12, 1964
ETP — Montreal	November 18, 1964
ETA — Milwaukee	November 22, 1964
ETS — Milwaukee	November 27, 1964
ETA — Chicago	November 27, 1964
ETS — Chicago	November 30, 1964
ETA — Port Huron	December 2, 1964
ETS — Port Huron	December 2, 1964
ETA — Montreal	December 5, 1964

*Plaintiff's Trial Exhibit 2*

## SERVICE OF SUIT CLAUSE (U. S. A.)

The place of physical and actual issue and delivery of this policy is the City of (\*) but nevertheless as between the Assured and the Assurers the place of suit hereon shall be deemed the United States of America, and any suit hereon may be brought against these Assurers in any Court of competent jurisdiction within the United States. The summons and other legal processes may be served on these Assurers by and in behalf of the Assured by mailing a copy thereof by United States Registered Mail addressed to Luke D. Lynch, Wilbur H. Hecht or Frank A. Bull, all of the law firm of Mendes & Mount, 27 William Street, New York City, New York, each of whom these Assurers hereby authorize to accept by and in their behalf such summons and other legal processes against these Assurers in any Court of competent jurisdiction within the United States. The mailing, as herein provided, of such summons or other legal process shall be deemed personal service and accepted by these Assurers as such, and shall be legal and binding upon these Assurers for all the purposes of suit. Final judgment against these Assurers in any such suit shall be conclusive; and may be enforced in other jurisdictions, including (\*\*) by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and of the amount of this indebtedness. The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purpose of suit as herein provided, the word "Assured" includes any Mortgagee under a ship mortgage and any person succeeding to the rights of any such mortgagee.

*Plaintiff's Trial Exhibit 2*

Applicable to Policies Subject to Section 59-A of the Insurance Law of the State of New York.

Underwriters hereon hereby designate the Superintendent of Insurance of the State of New York or his successor in office their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the (re) insured or any beneficiary hereunder arising out of this contract of (re) insurance.

It is agreed that if the Assured in accordance with permission granted under this policy shall bring suit hereunder in the United States of America the law to be applied by the Courts in determining liability under the Policy shall be the law of the United States of America.

Whichever City(ies) and Country(ies) applicable hereto.

<u>(*)</u>	<u>(**)</u>
Amsterdam	Holland
Hamilton	Bermuda
Kristiansand S	Norway
London	Great Britain
Montreal	Canada
Paris	France
Rotterdam	Holland
Toronto	Canada
Vancouver	Canada

These Clauses applicable only to Companies signing policy outside the U. S. A.

## Plaintiff's Trial Exhibit 3

NOT NEGOTIABLE

*Underwriters policy(ies) or certificate(s) will be duly issued.*

No. 76734

NEW YORK 5, N. Y.

November 16, 1964

To EAGLE OCEAN TRANSPORT, INC.

*Advice of Insurance effected through*

FRANK B. HALL &amp; CO., INC.

67 WALL STREET

INSURANCE BROKERS AND AVERAGE ADJUSTERS

Assured:

Orient Mid-East Lines and Eagle Ocean Transport, Inc., G.A.

Loss, if any, payable to Assureds, as interest may appear, or order.

\$58,000.

"OLAU GORM"

Rate: 3%

## ON INTEREST

This insurance is to indemnify the Assured up to \$58,000. for the actual costs and expenses voluntarily incurred by the assured for reforwarding such cargoes which they are unable to load at Great Lakes ports by reason of the vessel being delayed and thereby being forced to discontinue loading operations within the Great Lakes by reason of the announced closing date of the St. Lawrence Seaway solely by reason of:

- a) an accident or occurrence involving the insured vessel which would constitute a claim under the American Institute Time (Hulls) Form (amended to pay claims irrespective of percentage and to include Liner Negligence Clause) and/or breakdown of the insured vessel's

This insurance is warranted free of capture, seizure, arrest, restraint or detention etc. Damage by strikers, etc. as per Underwriters and/or Companies and/or Associations clauses.

By acceptance of this Cover Note the interests named herein agree that, upon default in payment of any premium or any installment thereof when due, Frank B. Hall & Co., Inc. are authorized by them to cancel this insurance; also that all losses and/or returns under these and/or any other policies effected and/or payable in whole or in part to the same interests on this or any other properties shall first be payable to Frank B. Hall & Co., Inc., New York to the extent of all indebtedness then due and unpaid to them.

*Plaintiff's Trial Exhibit 3*

engines and/or machinery including her loading and/or discharging machinery and/or equipment and/or auxiliaries and/or by loss of her propeller and/or rudder.

- b) slow steaming due to heavy weather.
- c) Delay in loading or discharging due to inclement weather or by reason of port congestion resulting from inclement weather.
- d) Loss of or damage to loading and/or unloading and/or bunkering equipment at loading and/or discharging and/or bunkering ports and/or fire howsoever and wheresoever arising.

*In accordance with your instructions those insurances have been affected abroad through correspondent brokers, subject to foreign law and custom, with Underwriters and/or Companies and/or Associations who may or may not be doing business in and/or suable in the United States.*

FRANK B. HALL & Co., INC.

per W. A. Bennett  
Brokers for Assured

- e) Delay in transiting any canal or seaway due to such canal or seaway having become blocked or navigation therein impeded by an accident involving another vessel or vessels and/or by damage of whatsoever nature to such canal or seaway and/or by ice.
- f) Delay by reason of shortage or non-availability of shore labor due to port congestion.

Subject to service of Suit Clause (U. S. A.)—attached.

Insured with Underwriters at Lloyds and British Companies through Sedgwick, Collins & Co., Ltd.

*Plaintiff's Trial Exhibit 3***NOTE**

Underwriters' acceptance of risk was predicated upon the following contemplated itinerary:

ETS — Montreal (inbound)	November 10, 1964
ETA — Toronto	November 12, 1964
ETA — Ashtabula	November 16, 1964
ETA — Toledo	November 18, 1964
ETA — Detroit	November 20, 1964
ETA — Chicago	November 22, 1964
ETA — Milwaukee	November 26, 1964
ETA — Green Bay	November 29, 1964
ETA — Port Huron	December 2, 1964
ETA — Buffalo	December 4, 1964
ETA — Montreal	December 6, 1964



*Plaintiff's Trial Exhibit 3*

## SERVICE OF SUIT CLAUSE (U. S. A.)

The place of physical and actual issue and delivery of this policy is the City of \* but nevertheless as between the Assured and the Assurers the place of suit hereon shall be deemed the United States of America, and any suit hereon may be brought against these Assurers in any Court of competent jurisdiction within the United States. The summons and other legal processes may be served on these Assurers by and in behalf of the Assured by mailing a copy thereof by United States Registered Mail addressed to Luke D. Lynch, Wilbur H. Hecht or Frank A. Bull, all of the law firm of Mendes & Mount, 27 William Street, New York City, New York, each of whom theses Assurers hereby authorize to accept by and in their behalf such summons and other legal processes against these Assurers in any Court of competent jurisdiction within the United States. The mailing, as herein provided, of such summons or other legal process shall be deemed personal service and accepted by these Assurers as such, and shall be legal and binding upon these Assurers for all the purposes of suit. Final judgment against these Assurers in any such suit shall be conclusive; and may be enforced in other jurisdiction, including (\*\*) by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and of the amount of this indebtedness. The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purpose of suit as herein provided, the word "Assured" includes any Mortgages under a ship mortgage and any person succeeding to the rights of any such mortgagee.

*Plaintiff's Trial Exhibit 3*

Applicable to Policies Subject to Section 59-A of the Insurance Law of the State of New York.

---

Underwriters hereon hereby designate the Superintendent of Insurance of the State of New York or his successor in office their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the (re) insured or any beneficiary hereunder arising out of this contract of (re) insurance.

---

It is agreed that if the Assured in accordance with permission granted under this policy shall bring suit hereunder in the United States of America the law to be applied by the Courts in determining liability under the Policy shall be the law of the United States of America.

---

Whichever City(ies) and Country(ies) applicable hereto.

<u>(*)</u>	<u>(**)</u>
Amsterdam	Holland
Hamilton	Bermuda
Kristiansand S	Norway
London	Great Britain
Montreal	Canada
Paris	France
Rotterdam	Holland
Toronto	Canada
Vancouver	Canada

These Clauses applicable only to Companies signing policy outside the U. S. A.

**Defendant's Trial Exhibit 1(a)**

C  
O  
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Y

ON TELECOMMUNICATIONS

CORNWALL, ONT. NOVEMBER 23, 1964,

SHIPPING FEDERATION OF CANADA  
300 ST SACREMENT MONTREAL  
WATER TEMPERATURE AT ST LAMBERT ON  
NOVEMBER 23 1964 IS 36 DEGREES F. LAST  
YEAR ON THIS DATE THE TEMPERATURE WAS  
44 DEGREES F. 129 OCEAN SHIPS WERE STILL  
ABOVE ST LAMBERT LOCK AT MIDNIGHT  
NOVEMBER 22 1964

C PURSER  
FOR R J BURNSIDE  
THE ST LAWRENCE SEAWAY  
AUTHORITY

285a

**Defendant's Trial Exhibit 1(b)**

C  
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P  
Y

**ON TELECOMMUNICATIONS**

**CORNWALL, ONTARIO  
NOVEMBER 25, 1964—10:43 A.M.**

**SHIPPING FEDERATION OF CANADA  
300 ST SACREMENT MONTREAL  
WATER TEMPERATURE AT ST LAMBERT ON  
NOVEMBER 25 1964 IS 34.5 DEGREES F. LAST  
YEAR ON THIS DATE THE TEMPERATURE WAS  
43 DEGREES F. 123 OCEAN SHIPS WERE STILL  
ABOVE ST LAMBERT LOCK AT MIDNIGHT  
NOVEMBER 24 1964**

**C S PURSER  
FOR R J BURNSIDE  
THE ST LAWRENCE SEAWAY  
AUTHORITY**

**Defendants Trial Exhibit 1(c)**

C  
O  
P  
Y

**ON TELECOMMUNICATIONS**

1964 NOV 26 AM 11 06  
OTTAWA ONT

J E MATHESON  
ASSISTANT GENERAL MANAGER  
SHIPPING FEDERATION OF CANADA  
300 ST SACRAMENT ST  
MONTREAL

WITH WATER TEMPERATURE AT ST LAMBERT LOCK THIS MORNING DOWN TO 35 DEGREES FAHRENHEIT, SIX DEGREES COLDER THAN ON THE SAME DATE LAST YEAR, THE ST LAWRENCE SEAWAY AUTHORITY HAS ISSUED AN URGENT WARNING TO OCEAN VESSELS TO MAKE ARRANGEMENTS TO CLEAR THE SYSTEM BY THE OFFICIAL CLOSING DATE NOVEMBER THIRTIETH PREVIOUSLY ANNOUNCED.

WEATHER UNCERTAINTIES WHICH SOMETIMES PERMIT CONTINUOUS TRANSITS LATER THAN THE FORMAL CLOSE, AT OTHER TIMES—AS MAY BE THE CASE THIS YEAR—MAKE THE LAST FEW DAYS OF THE REGULAR SEASON QUITE HAZARDOUS. A CONTINUANCE OF PRESENT WEATHER TRENDS COULD BRING A FORCED CLOSING ON A VERY SHORT NOTICE.

THERE WERE 119 OCEAN SHIPS UP STREAM OF ST LAMBERT LOCK AT MIDNIGHT LAST NIGHT. SOME STILL EVEN ON THEIR WAY UP BOUND TO GREAT LAKES PORTS. IN THE WELLAND CANAL AND THE UPPER LAKES, THERE WERE STILL 86 OCEAN VESSELS. THUS IT IS IMPORTANT PARTICULARLY TO OCEAN SHIPS, IN ORDER THAT THEY MAY AVOID THE POSSIBILITY OF BEING TRAPPED IN THE GREAT LAKES, TO TAKE INTO ACCOUNT PRESENT CLIMATIC CONDITIONS AND TO SCHEDULE THEIR DEPARTURE FROM SEAWAY WATERS ACCORDINGLY—

**THE ST LAWRENCE SEAWAY AUTHORITY**

**Defendant's Trial Exhibit 1(d)**

**TELECOMMUNICATIONS**

November 27, 1964

Please send to the following two addresses—

Shipping Federation of Canada,  
300 St. Sacrement Street,  
Montreal, Quebec.

Dominion Marine Assoc.,  
Attn. Capt. F. R. Hurcomb,  
Roxborough Apts.,  
Elgin & Laurder,  
Ottawa, Ontario.

WATER TEMPERATURE AT ST. LAMBERT ON NOVEMBER 27, 1964 IS 34.5°F. LAST YEAR ON THIS DATE THE TEMPERATURE WAS 41°F. 123 OCEAN SHIPS WERE STILL ABOVE ST. LAMBERT LOCK AT MIDNIGHT NOVEMBER 26, 1964.

Original Signed by  
C. S. PURSER  
for  
R. J. Bernalde.

c.c. Mr. D. MacKenzie  
Mr. C. S. Purser

ORIENT MID-EAST LINES, INC.

v.

COOPERATIVE FOR AMERICAN  
RELIEF EVERYWHERE

v.

UNITED STATES  
D. C. Nos. 6-65, 7-65, 22-65,  
B4-65 CONSOL

**FILED**  
APR 2 1968  
ROBERT M. STEARNS, Clerk

**Defendant's Trial Exhibit 1(e)**

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Y

**ON TELECOMMUNICATIONS**

1964 NOV 30 AM 11 12  
CORNWALL ONT

SHIPPING FEDERATION OF CANADA  
300 ST SACREMENT ST  
MONTREAL

WATER TEMPERATURE AT ST LAMBERT ON NOVEMBER 30 1964 IS 34.5 DEGREES F. LAST YEAR ON THIS DATE THE TEMPERATURE WAS 40.0 DEGREES F. 83 OCEAN SHIPS WERE STILL ABOVE ST LAMBERT LOCK AT MIDNIGHT NOVEMBER 29th 1964—

U S PURSER FOR R J BURNSIDE  
THE ST LAWRENCE SEAWAY AUTHORITY

289a

**Defendant's Trial Exhibit 1(f)**

C  
O  
P  
Y

CN TELECOMMUNICATIONS

CORNWALL, ONTARIO.

DECEMBER 2, 1964.  
9.39 A.M.

SHIPPING FEDERATION OF CANADA  
300 ST SACREMENT ST MONTREAL

WATER TEMPERATURE AT ST LAMBERT ON  
DECEMBER 2, 1964 IS 32.0 DEGREES F. LAST YEAR ON  
THIS DATE THE TEMPERATURE WAS 36.5 DEGREES F.  
67 OCEAN SHIPS WERE STILL ABOVE ST LAMBERT  
LOCK AT MIDNIGHT DECEMBER 1, 1964

C S PURSER  
FOR R J BURNSIDE  
DIRECTOR OF OPERATIONS  
ST LAWRENCE SEAWAY AUTHORITY



290a

**Defendant's Trial Exhibit 1 (g)**

CN TELECOMMUNICATIONS

CORNWALL, ONTARIO.

DECEMBER 4, 1964.

10:52 A.M.

SHIPPING FEDERATION OF CANADA  
300 ST SACREMENT STREET  
MONTREAL

WATER TEMPERATURE AT ST LAMBERT ON  
DECEMBER 4, 1964 IS 32.0 DEGREES F. LAST YEAR ON  
THIS DATE THE TEMPERATURE WAS 34.0 DEGREES F.  
39 OCEAN SHIPS WERE STILL ABOVE ST LAMBERT  
LOCK AT MIDNIGHT DECEMBER 3RD. ICE IS SLOWING  
SHIP TRANSITS AT ST LAMBERT

C S PURSER  
FOR R J BURNSIDE  
DIRECTOR OF OPERATIONS

**Deposition of Captain Orfanos Taken June 29, 1965**

[4] ANESTIS STAMATIOS ORFANOS, having been first duly sworn by the Notary Public, was examined and testified as follows:

*Examination by Mr. Poor:*

Q. Captain Orfanos, are you at the present time master of the Orient Mariner? A. Yes.

Q. And who is the owner of the Orient Mariner? A. Well, I know Eagle-Ocean Transport are the general agents in New York. Orient Mid-East is the owner.

Q. When did you become the master of the Orient Mariner? A. On the 29th of May.

Q. 1965? A. 1965.

Q. Had you previously been the master of the Orient Merchant? A. Yes, sir.

[5] Q. Are you licensed as a master by the Greek Government? A. Yes.

Q. When did you obtain that license? A. That was in March 1964.

Q. When did you first go to sea? A. That was in 1955. No, 1952.

Q. Did you spend a year at a nautical college in Greece? A. Yes. After I graduated from the high school, I went to nautical college.

Q. Have you been on ships trading to and from the Great Lakes? A. Yes, sir, for many years. Since 1960, twice a year, all around the Great Lakes ports.

Q. I will show you a log abstract which commences on November 13, 1964.

Was this log abstract prepared by you or under your direction? A. Yes, sir.

Q. And it was visaed by the Greek Consul in Toronto, I believe. A. That's right.

\* \* \*

*Deposition of Captain Orfanos Taken June 29, 1965*

[13] (Discussion off the record.)

*By Mr. Poor:*

Q. While you were at Milwaukee and Chicago, did you at any time receive any notice from the seaway authorities, notifying you that you must sail if you wish to reach the seaway before it was closed?

Mr. Leach: I object to that question. That is leading.

Mr. Silberfarb: I join in the objection, too.

Mr. Poor: Please answer.

A. No. We never had such notice, no information.

Q. Was anything done by you to ascertain when the seaway was likely to be closed?

Mr. Leach: I object to that question as to the form. It is leading.

A. I will tell you, I didn't have any direct contact with the seaway. So, also, I had orders from the port captain, who was in contact with our New York people.

Q. That is, when you say "the port captain", you mean the port captain—— A. Attending the loading.

Q. He was the port captain of the owners of the Orient Merchant? [14] A. That's right.

Q. Was there another ship at the Port of Kenosha at that time? A. Yes. There was the Flying Independent.

Q. Did you keep in touch with the Flying Independent? A. Yes. We knew the times she was supposed to sail and loading—all her actions in the port.

Do you know if she sailed before you did? A. We sailed first, and we reached first at Iroquois Lock in Welland, on the seaway.

*Deposition of Captain Orfanos Taken June 29, 1965*

Q. Iroquois Lock is in the seaway? A. Yes. Welland Canal is before the seaway.

Mr. Poor: In order to assist everybody in identifying the various ports, I have a very small sized map here which shows the Great Lakes.

Mr. Leach: Who put the "X's" on the map?

Mr. Poor: I don't know.

The "X's" merely identify various places. You may move to strike them out if you wish.

Mr. Leach: Yes, I do. I move to strike those "X's", those written in things.

Mr. Silberfarb: Off the record.

(Discussion off the record.)

\* \* \*

[57] Q. Would you identify the agents up in Montreal for the vessel? A. I know them.

Q. Who are they? A. Hurum Shipping and Trading Company.

Q. And do you or do you not recall whether there were any representatives from Hurum aboard the vessel? A. Yes, there would be someone, but I don't remember which of them. I know all the people up there, the agents. Personally I don't remember which one came aboard.

Somebody usually came aboard the ship to clear the vessel. I say that somebody should be on board the ship. I cannot recall which one of them, because I know all of them personally, because we trade so many times up there, and I know them, but I cannot remember which of them it was of the agents. I don't remember which.

Q. Did you have on your ship a seaway handbook? A. Yes.

You did? A. Yes.

*Deposition of Captain Orfanos Taken June 29, 1965*

Q. What about any seaway circulars? Did you [58] have any seaway circulars? A. Yes, we have received some circulars.

Q. Can you identify this? A. This is the seaway handbook.

Q. This was contained on the ship? A. Yes.

Q. Do you recall in your copy of your seaway handbook this circular No. 4, which describes the navigation season? A. Well, no. I can't recall by numbers.

Q. That is all right.

Would you mind reading that, which is a part of the seaway handbook? A. All right.

Q. What you just read was apparently the closing dates for the seaway, is that correct? A. Yes.

Q. For its respective locks? A. Well, I will tell you——

Mr. Poor: I object. If it is a written instrument, it should be offered in evidence and not testified to by a witness. If you want to read it into the record, go ahead. What the captain's conclusions are is not evidence.

[59] Mr. Leach: I would like to have it marked. I will ask that circular No. 4 abstracted from the seaway handbook be marked.

(Circular No. 4, abstracted from seaway handbook marked Respondent-Intervenor Exhibit A for identification, as of this date.)

Mr. Poor: I will object to it on the ground it is not the original.

*Deposition of Captain Orfanos Taken June 29, 1965*

*By Mr. Leach:*

Q. Captain, do you recall reading this before? A. Yes.

Q. Do you recall reading it? A. Yes.

Q. Do you know when you read it? A. Yes, I read it.

Q. Do you know when you read it? A. When?

Q. Yes. A. Well, I can't recall when. I know that I read it some time. I can't remember when I read it.

Q. Did you read it before you transited the seaway?

A. Well, I wouldn't say this time. I cannot specify the time I read it. I know about this book and I read [60] it. I can't remember the particular date.

Q. What is the closing date, according to that circular, of the seaway? A. It was November 30th, according to that circular.

Q. For what part of the seaway?

Mr. Poor: I object to having the captain testify as to the contents of a written document.

Mr. Leach: You can answer the question, captain.

Q. From that circular, at what dates does the seaway close? A. It says here on the 13th.

Q. What part of the seaway does it cover? A. South Shore, Beauharnois, Wiley-Dondero, Iroquois, Lachine and Cornwall Canals.

Q. Captain, have you ever seen seaway circular No. 10, and can you identify that, first of all? A. Well, I don't remember. I cannot remember all their circulars and notices that I received on board the vessel.

Q. Do you know whether or not this document was on board the vessel at the time you transited the seaway in November 1964? A. I cannot recall, sir. If you bring me a thousand [61] of these notices now, I cannot remember if I had them on board the vessel then.

*Deposition of Captain Orfanos Taken June 29, 1965*

Mr. Leach: I would like to have this marked.

Mr. Poor: Objected, on the basis it is a copy and not identified by the captain.

(Seaway Notice No. 10 of 1964 of seaway book marked Respondent-Intervenor Exhibit B for identification, as of this date.)

*By Mr. Leach:*

Q. Is there a place for keeping seaway circulars on board the vessel? A. Well, you mean a special place?

Q. Yes. Do you have a repository for them or a book that you keep? A. I mean we keep all of them in the chart room, all the notices and seaway circulars. We keep them in the chart room. I cannot say there is a special drawer for that marked seaway notices, no.

Q. Did you receive any circulars before you transited the seaway coming into the Great Lakes at this time? A. I don't remember.

Q. Captain, have you ever in your past experience entered the Great Lakes as late as November 19th—the [62] seaway, I should say. A. I don't remember. I can't recall.

Q. What vessels were you aboard? A. Orient Trader.

Q. That was the only other vessel? A. Yes. I served three years and two months on the Orient Trader, and we were trading in the Great Lakes.

Q. You don't recall whether the Orient Trader ever came into the seaway as late as November 19th before? A. No, I don't remember.

Q. Captain, do you know what the formal closing date of Iroquois Lock is? A. No. The thing is—the understanding is this—

Q. Captain, you either know the answer to the question or you don't know. A. I do not know.

*Deposition of Captain Orfanos Taken June 29, 1965*

Q. You do not know the formal closing date? A. No.

Q. You did have a copy of the seaway handbook on board the vessel? A. Yes, I did.

Q. Does the formal closing date for Iroquois Lock appear in the seaway handbook? A. It appears. You are asking me if I know the date.

[63] Q. Formal closing date of Iroquois Lock. A. Yes, you want me to remember all the regulations of the ports and the locks.

Q. No, captain, I didn't ask you for all the regulations. I just want to make it clear in my mind that you do not know the closing, formal closing date of Iroquois Lock. A. Well, I don't remember, sir.

Q. What about the official closing date? A. Official is the 30th of November.

Q. When I said "formal", I guess I meant "official" as far as you are concerned. A. I told you before I am not a master of the English language. Excuse me. This is your native language.

Q. So it is settled, captain, you do know the official closing date for Iroquois Lock? A. I know the seaway.

Q. What date was that? A. 30th of November.

Q. Referring back to your log, on November 19th you transited what locks up the seaway system? A. St. Lambert, St. Catharines, Lower Beauharnois, Upper Beauharnois, Snell, Eisenhower Lock and Iroquois.

Q. That was all on the 19th. You didn't

\* \* \*

[81] Q. But it was possible that you did? A. That is what I said, I don't remember receiving.

Q. Do you know what the weather conditions were around Calumet at that time? A. Well, I mention it in the log book.



*Deposition of Captain Orfanos Taken June 29, 1965*

Q. What was the source of your weather information at this point? From whom did you receive weather reports?

A. While I was in the port?

Q. Yes. A. Weather information?

Q. Yes. A. I can see the weather. I don't need the weather while I am in the port.

If it rains, I have to stop loading and cover up. If it clears up, I have to open up the hatches and start loading.

Q. At any time while you were on Lake Michigan, did you receive weather reports from any agencies, any governmental agencies? A. I don't remember if we received.

Q. In other words, the only weather information you had was what you collected yourself, is that right? A. I can't understand what you mean by weather informa- [82] tion. About what?

Q. I will try and clear it up a little bit. A. Tell me what you mean by weather information. Forecast?

Q. Forecasts. A. Yes. I told you from the beginning before that we listen to the radio and know the time. We can go with the pilot on the radio and we get the weather report. We report it.

Q. Who broadcasts it? A. The shore stations, There are many stations over the Great Lakes. Say, Lorain gives weather information, maybe Toronto or Buffalo, from Rogers City.

Q. From Calumet Harbor, where did the vessel go? A. After the vessel was loaded, we proceeded to Navy Pier.

Q. Did you load all your cargo at Calumet Harbor? A. Did we load all our cargo?

Q. Yes. A. I don't remember if we left someone behind.

Q. Would that appear in your log? A. No.

Q. You might have left some cargo behind? A. Well, I'll tell you this: I put in the log what

\* \* \*

*Deposition of Captain Orfanos Taken June 29, 1965*

[88] A. No.

Q. How many tons? A. I don't remember, sir.

Q. Why did you leave it there? A. Because we had to proceed.

Q. Was this on the port captain's instructions? A. Yes. He is the one with whom I am mostly in contact with. He tells me what to do. He contacts the office here and there. That is the man that I deal directly with.

Q. Did you receive any notices from the seaway authority or from your agents or from the vessel's agents about the seaway system's condition for the period from about the 26th of November until the 3rd, when you left Milwaukee? A. Well, I don't remember receiving it.

Q. You don't remember receiving anything? A. No.

Q. Tell me this: Would your receipt of information have affected the way you scheduled the vessel's procedure in the Great Lakes, as far as getting out of the seaway? A. I didn't get that.

Q. Would your receiving any information [89] concerning the seaway system's condition have affected your scheduling the vessel? A. I can't understand it.

Q. If you had received information from either the seaway authorities or from your agents——A. I don't remember.

Q. If you had, would this have affected the way you scheduled the vessel's departure time? A. Well, I tell you, I don't schedule the vessel's departure.

Q. Who does? A. The office. I mean, the port captain is in contact with the office. They make up the schedule. I couldn't make up the schedule.

Q. If seaway conditions came to your attention, wouldn't you have authority to schedule either an earlier departure date or a later departure date? A. Well, this is

*Deposition of Captain Orfanos Taken June 29, 1965*

something dealing with the Greek laws. I have my owners. I can't say what I should do. I am a master. First thing I have to do if something came to my attention is to inform my owners. That is what the Greek law is.

Q. Did anything come to your notice requiring you to inform your agents or your owners at any time [90] during the period from while you were in either Chicago or Milwaukee—A. Don't give me so much. It is a long question.

Q. While you were in Chicago and Milwaukee, did anything come to your attention which would have required you to inform the owners? A. No. Something requires me to tell my office—

Q. On the 26th of November or after the 26th of November, did you receive information that water temperatures in the area of the Iroquois Lock were running between five and ten degrees below normal? A. I don't remember receiving such information, sir.

Q. If you had known this between the 26th of November and 1st of December, would you have considered that something that you should bring to your owners, the vessel owners' attention? A. Well, I don't think that this is the right question to ask me what I should have done. I mean, that is something that I should decide if I have been in this case.

Now you ask me what would my action be. That is what you are asking me—what my action would be if something came to me.

Q. That is exactly what I am asking you. I would [91] like you to answer the question. A. Well, I don't know if I can answer the question of what might be my actions if I had that information. I had to decide at the time.

*Deposition of Captain Orfanos Taken June 29, 1965*

If you ask me what you should do, if you were in a sensitive position, that is not a question we can answer here. If I was at that time, I should act.

Q. Is it so difficult to put yourself in that position now, captain? A. Yes, because I am not the same being here as on the ship. It is not the same thing.

Q. If you were informed that weather temperatures and water temperatures—first of all weather temperatures in the area of the Iroquois Lock were running between 16 and 20 degrees below normal, and that the forecast was for the same, would you have considered this important, as far as scheduling the vessel's exit from the seaway, through the seaway? A. Yes, I should inform my owners.

Q. And also, if it had come to your attention that the water temperatures were similarly running between six and ten degrees below normal, from the 26th of November until the 1st of December, and that the [92] forecast was for more of the same, would you have considered that an important factor in deciding when to get your vessel through the seaway? A. Well, I tell you something, I don't know. All the weather conditions in the Great Lakes to decide if it is something important to inform or not, sometimes. Now—you give me a specific figure and numbers, but to see that this is important, I would have to read the pilot book of the Great Lakes and give you the answer.

Q. Tell us again, captain, what was the official closing date of the Iroquois Lock? A. My understanding is that 30th of November—I am giving you my understanding—the seaway has no responsibility for the vessels on the Great Lakes any more. I know they never left any vessel in the Great Lakes behind that date. That was the first time that they left some vessels.

*Deposition of Captain Orfanos Taken June 29, 1965*

Talking about officially closing, I know on that date, the 30th of November, the seaway authorities did not have any responsibility for the vessels. I don't mean no vessels are sailing after a date.

Q. Captain, if the seaway warned you on the 26th of November that from all weather forecasts it looked to them as though the Iroquois Lock would close on the [93] official closing date, November 30th, and all vessel masters should get their vessels clear of that point on that day, would you consider it—— A. If they did what you said, that is another thing.

Q. What would you think if they did? A. I give you my understanding of what the 30th of November is, to my understanding. They never close before. I would say I never remembered them to close the seaway before the 5th or 6th—say before the 12th of December.

The way you put the thing is that they are so strict on the 30th that they will close, but they never close.

Q. Isn't this a seasonal thing? Ice doesn't form on a particular day in a particular spot, does it? A. No.

Q. Doesn't this vary? A. Yes, it varies.

It never came so close to the 30th of November.

Q. Well, if you had information—— A. If I had information that they would close on that day, that is another thing.

Q. Captain, let me ask the question, if you had [94] information that the weather conditions were abnormal—well, I will put this way, below say what normal temperatures were at this time of year, at this particular place, would you consider this significant in making this decision? A. Of course, if I have that information, of course. If I knew this temperature was abnormal, of course.

*Deposition of Captain Orfanos Taken June 29, 1965*

Q. And if it was below normal? A. Below normal is what I mean. If I knew it was below normal.

Q. You don't know as a matter of fact whether the weather was below normal? A. No.

Q. But the temperature could have been?

Mr. Poor: Objected to as hypothetical and not based on any testimony in the case.

Q. I say the temperature could have been below normal, could it not have? A. Yes.

Q. Well, did you know that the temperature was normal that day at the Iroquois Lock? A. Yes, I believe it was normal.

Q. Where did you get your information from? A. Well, I didn't get any information. I thought [95] everything was normal. Nobody informed me to the contrary.

Q. Nobody informed you to the contrary? A. No.

Q. So because you were not informed of the contrary, you just assumed it was normal? A. Of course.

Q. Had you ever been in the seaway this late in the season before? A. Like what? I have been late. I would say with the Trader I think it was the 3rd of December when we got out of the seaway once.

Q. What year was that? A. About '61 or '62. I don't remember.

Q. Orient Trader, 1961? A. '61 or '62. I don't remember.

I remember once—I don't remember the date, but I know from experience that many vessels leave on the 10th and 12th and 15th of December. They never close. My understanding was that they wait until all the vessels get out of the seaway after some reasonable date, and then they

*Deposition of Captain Orfanos Taken June 29, 1965*

close the seaway. That is my feeling and understanding of the seaway closing.

They put some date as just to get rid of the [96] responsibility for the seaway authorities, but not closing as of that date, because many vessels were left behind up to the 10th or 12th of December, and all of them were let out.

Q. What years were these? A. I cannot say specifically the year, but I mean the experience, of what I remember.

Q. You weren't there, were you? A. I was interested in the Great Lakes. I was sailing for so long.

Q. On the 26th of November, where were you? Where was your vessel? A. At Milwaukee.

Q. On that day, if you had received a notice that the seaway authority warns that because of subnormal water temperatures and sub-normal air temperatures in the area of the Iroquois Lock, the official closing date will be the actual closing date of the seaway this year, and all vessels should transit on the official closing day, would you consider this important? A. Of course. Very important.

Mr. Poor: I object to the question as being asked and answered about half a dozen times.

Q. Would you have attempted to get your vessel [97] out of the seaway? A. On my own initiative? What do you mean?

Q. Yes. Would you have sailed A. I have to inform my owners. If I had that information, I should pass it over to my owners, say my office in New York or the agents or port captain.

Q. You are the master of the vessel, and you were the master of the vessel. A. You are telling me I am the master. One of my obligations is to inform my owners, my

*Deposition of Captain Orfanos Taken June 29, 1965*

principals. I have obligations to my owners and agents and some other people. I can't get the vessel and do whatever I like. I am obliged under Greek laws to do this.

Q. Who did you take your orders from? Who gave you your orders? A. I told you before, I have the port captain in touch with the New York office. I talk with him, and also the agents there were in contact with the office.

Q. So it was the port captain who directly gave you your instructions? A. That's right. He was consulting with other people.

Q. Captain, are you aware that the seaway authority distributes notices and circulars at its various offices throughout the Great Lakes? Did you [98] know that? A. Various offices.

Q. Yes, at their offices, their locations throughout the Great Lakes. A. Well, I didn't get any information from these offices. Just notices on the locks as we went through.

Q. Did you check at any of their offices for any notices or circulars? A. No, sir.

Q. You didn't? A. No.

Q. Did you pass the Port of Detroit? A. Yes.

Q. Do you know for a fact if there is a seaway authority office at Detroit? A. Well, I do not know. I never had time for these places.

Q. What about at Milwaukee? Do you know whether there is a seaway authority, either Canadian or American office at Milwaukee? A. I don't know.

Q. And you didn't check there to see if there were any notices? A. I don't know if my office did.

[99] Q. Do you know if there is a seaway office at Chicago? A. Well, if you ask me for all the ports, I cannot tell you.



*Deposition of Captain Orfanos Taken June 29, 1965*

Q. You didn't know Detroit and you didn't know Milwaukee. I am asking if you know Chicago. A. No.

Q. You don't know if there is a seaway office there? A. I know that sometimes there was a man coming on board the ship and asking questions and getting some information. I know at Chicago especially. I don't know the man, but I don't remember his name.

Q. Did you check with him to see if there were any seaway notices or circulars regarding closures of the locks or anything affecting closure of the locks? A. No, I didn't check it.

Mr. Poor: Please note that the attorney representing the United States has left the room over my objections.

Mr. Leach: For the record, I would like to say that Mr. Poor this morning asked for a break, and I amnanimously gave it to him without an objection.

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**Letter Dated May 3, 1967 From Allen van Emmerik  
to the Honorable Howard F. Corcoran, U. S. D. J.**

[Letterhead of]

UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D. C. 20530

May 3, 1967

Honorable Howard F. Corcoran  
Judge of the United States  
District Court for the  
District of Columbia  
Washington, D. C. 20001

Re: Orient Mid-East Lines, Inc. v.  
CARE and United States  
District of Columbia, Admiralty  
No. 6-65, and consolidated cases,  
Admiralty Nos. 7-65, 22-65 and 34-65

Dear Judge Corcoran:

On the understanding that the court files in these cases are presently in Your Honor's chambers, there are enclosed herewith, copies being supplied by carbon copy of this letter to counsel, the originals of respondent's Exhibits A and B to the deposition of Captain Orfanos. Your Honor may recall that there was some discussion at the trial about this deposition, and the whereabouts of the Exhibits thereto. I request that the enclosures be attached to the deposition and admitted into evidence, since it was also agreed on the record that all objections raised at the deposition were waived.

Your Honor may also recall that during the testimony of Mr. McGannon the Government agreed to obtain for the

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*Letter Dated May 3, 1967 From Allen van Emmerik to the  
Honorable Howard F. Corcoran, U. S. D. J.*

record the unit cost of trucking expense from the pier area to warehouses outside the pier area. For all commodities, regardless of distance to the warehouse, the rate charged in the Summer of 1965 was 13 cents per hundredweight each way, the round-trip totalling 26 cents per hundredweight. We have documentation should counsel wish to verify this figure.

Very truly yours,

Allen van Emmerik  
Attorney

Enclosures

*Letter Dated May 3, 1967 From Allen van Emmerik to the  
Honorable Howard F. Corcoran, U. S. D. J.*

cc: David G. Bress, Esquire (w/o enc.)  
United States Attorney  
Washington, D. C. 20001

Attention: E. Grey Lewis, Esquire  
Assistant United States Attorney

cc: Stanley O. Sher, Esquire (w/enc.)  
818 18th Street, N. W.  
Washington, D. C. 20006

cc: Marvin J. Coles, Esquire (w/enc.)  
Donald D. Webster, Esquire  
Messrs. Coles & Goertner  
1000 Connecticut Avenue, N. W.  
Washington, D. C. 20036

cc: Wharton Poor, Esquire (w/enc.)  
Messrs. Haight, Gardner, Poor & Havens  
80 Broad Street,  
New York, New York 10004

bcc: Department of Agriculture (w/o enc.)  
Office of the General Counsel  
Washington, D. C. 20250

(Your Ref: HBP:RTI 202-6-304)

bcc: Department of State (w/o enc.)  
Agency for International Development  
Washington, D. C. 20523

Attention: Leslie A. Grant, Esquire  
Deputy General Counsel

**Circular No. 4 marked Exhibit A at Orfanos Deposition****CIRCULAR NO. 4**

(U. S. Rule 401.104-1 to 401.104-47)

**TRANSIT INSTRUCTIONS****Navigation Season**

4-1 Unless in the opinion of the Authority weather and ice conditions do not so allow, navigation on the Seaway will open and will close on the following dates in each year:

	Open	Close
Welland and Third Welland Canals .....	April 1	December 15
Sault Ste. Marie Canal ..	April 4	December 12
South Shore, Beauharnois, Wiley-Dondero, Iroquois, Lachine and Cornwall Canals .....	April 15	November 30

**Special Instructions**

4-2 Special instructions must be applied for to the Authority in connection with the intended transit of every vessel exceeding seven hundred and fifteen feet in overall length or seventy-two feet in beam and in connection with the intended transit of vessels of unusual design, hulls, sections of vessels, large dredges and all vessels in tow, and such vessels shall not transit except in strict compliance with such instructions.

**Compliance with Instructions**

4-3 The Master of a vessel shall comply promptly with all transit instructions given by an officer or a station, and,

*Circular No. 4 marked Exhibit A at Orfanos Deposition*

if an instruction to move a vessel is not complied with, the Authority, in addition to any other duly authorized action, may relocate the vessel with respect to which the instruction was given.

**Available Depths and Draught**

4-4 Main Seaway channels have a controlling depth of 27 feet, and the loading, draught and speed of a vessel in transit shall be controlled by the Master, according to the vessel's individual characteristics and its tendency to list or squat, so as to avoid striking bottom: Draught shall not, in any case, exceed the Maximum Permissible Draught which is prescribed by the Authority or notified by an officer or a station for the part of the Seaway in which a vessel is in transit.

**Maximum Draught for Lachine, Cornwall  
and Sault Ste. Marie Canals**

4-5 Vessels shall not transit the Lachine, Cornwall or Sault Ste. Marie (Canada) Canals with a draught in excess of the Maximum Permissible Draught currently prescribed by the Authority for the Canal in question and unless the available depth of water on the appropriate controlling point for draught exceeds by at least three inches the maximum draught of the vessel at the time.

**Inadequate Ballast**

4-6 Vessels, which are in the opinion of an officer not adequately ballasted, may be refused transit or may be delayed.

**Seaway Notice No. 10 of 1964 Marked Exhibit B at  
Orfanos Deposition**

[Letterhead of]

*THE ST. LAWRENCE SEAWAY AUTHORITY  
ADMINISTRATION DE LA VOIE MARTIME DU SAINT-LAURENT*

**SEAWAY NOTICE**

**NO. 10 of 1964**

**Closing of Navigation**

The formal dates set for the closing of the Seaway  
Canals are:

South Shore Canal	
(Montreal to Lake St. Louis)	Nov. 30
Beauharnois Canal	Nov. 30
Iroquois Canal	Nov. 30
Lachine Canal	Nov. 30
Cornwall Canal	Nov. 30
Sault Ste. Marie Canal (Canadian)	Dec. 12
Welland Canal and Third Welland Canal	Dec. 15

Weather and ice conditions could force the Seaway to  
be closed earlier than these formal dates.

Masters and owners of ocean vessels are advised that it  
is their responsibility to schedule their passages to ensure  
clearing the South Shore Canal at St. Lambert before the  
closing date if they wish to avoid being forced to winter  
above Montreal, should an early freeze occur this year, as  
it has in a number of years past.

If favourable climatic conditions prevail later than the  
formal closing dates, operation of the canals will be con-  
tinued but, obviously, subject to close on very short notice.

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*Seaway Notice No. 10 of 1964 Marked Exhibit B at  
Orfanos Deposition*

Due to the construction program, and regardless of prevailing climatic conditions, there can be no extension of the Welland Canal closing date of December 15.

R. J. Burnside,  
Director of Operations.

Cornwall, Ontario,  
November 2, 1964

4-13-3-1



**Letter Dated May 5, 1967 From R. J. Burnside, Director of Operations, St. Lawrence Seaway Authority to Mr. Donald D. Webster of Coles & Goertner**

[Letterhead of]

THE ST. LAWRENCE SEAWAY AUTHORITY  
ADMINISTRATION DE LA VOIE MARITIME DU SAINT-LAURENT

P. O. Box 98,  
Cornwall, Ontario.

May 5, 1967.

Mr. Donald D. Webster,  
Coles & Goertner,  
1000 Connecticut Avenue, N.W.,  
Washington, D. C. 20036

Dear Mr. Webster:

In accordance with your request of April 20th, I have written to the Telephone Company handling calls of December 1st and 2nd, 1964 asking them to search their billing records respecting these calls. The Bell Telephone Company has not yet replied.

Our telephones are arranged so that long distance calls may be dialled by our Seaway telephone switchboard operator or directly from the various office telephones. Our switchboard operator keeps a working sheet of long distance calls made by her. Similar sheets for calls originating at local office telephones were not maintain. I am enclosing a copy of the switchboard operator's work sheet of December 1, 1964. This sheet indicates that Mr. MacKenzie telephoned Mr. Leros at New York—Whitehall 4-5740 on December 1, 1964 so that a telephone call originating at this office was made to Mr. Pendas' office on that date.

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*Letter Dated May 5, 1967 From R. J. Burnside, Director  
of Operations, St. Lawrence Seaway Authority to Mr.  
Donald D. Webster of Coles & Goertner*

A further search in our financial records has disclosed telephone billings for December 1st and 2nd, 1964. A copy of the sheet is enclosed. It shows that on December 1st a telephone call was made from our Seaway office here to New York—Whitehall 4-5740. A hand written appendage indicates that the call was allocated to Mr. MacKenzie's office.

A copy of the work sheet and of our telephone billings is being sent to Mr. Sanders, and you and he may determine whether they should be considered in evidence.

I will write to you again when I receive a reply from the Bell Telephone Company.

Yours very truly,

R. J. Burnside  
R. J. BURNSIDE,  
Director of Operations.

*Enclosures*

cc: Mr. Barefoot Sanders

# Switchboard Operator's Work Sheet of November 30, 1964 and December 1, 1964

Nov 30 1964

Winc	774-2420	Mrs. Ackers	L. Desiosier	1 /	.80
St. Cath.	MU 4-9461	Perfetto	Larue	3 /	2.40
St. Cath.	WE 5-5202	Mathies	Moore	4 /	2.80
Card.	657-3270	Mrs. Stiades	Haines	7 /	1.50
St. Cath.	WE 5-5202	Mathies	Hunter	4 /	2.80
St. Cath.	MU 4-9461	Perfetto	Quigg	2 /	2.40
St. Cath.	MU 4-6571	Walters	Hunter	3 /	2.40
St. Cath.	MU 4-9461	Perfetto	Carriere	6 /	3.60
St. Cath.	WE 5-5202	Mathies	Hunter	5 /	3.20

DEC -1 1964

St. Cath.	WE 5-5202	Mathies	Hunter	1 /	2.40
N.Y.					
New York	WH 4-5740	Lyros	McKenzie	4 /	2.00
St. Cath.	WE 5-5202	Mathies	Hunter	3 /	6.40
St. Cath.	MU 5-5300	Stoughton	Walker	3 /	2.40
St. Cath.	MU 4-9461	Campbell	McKenzie	2 /	2.40
St. Cath.	WE 5-5202	Mathies	Moore	4 /	2.80
Ohio					
Cleveland	861-7800	Mayer	Markell	3 /	1.90
St. Cath.	MU 4-9461	Campbell	Walker	1 /	2.40
St. Cath.	MU 4-6571	McLaughlin	Walker	2 /	2.40
Toro.	924-3381	H. Fullerton	Quigg	7 /	4.00
Quebec	692-1657	Cyril Quinn	Larue	2 /	2.20

**Telephone Bill Rendered Seaway Authority for  
December 1 and 2, 1964**

**LONG DISTANCE SERVICE—SERVICE INTERURBAIN**

Day Jour	Month Mois	Code		Details Details		Amount Montant
1	12	1	ST CATHRNS	ONT	MU5 5300	2.40—Walker
1	12	1	TORONTO	ONT	924 3381	4.00—Quigg
1	12	1	ST CATHRNS	ONT	WE5 5202	2.80—Moore
1	12	1	ST CATHRNS	ONT	WE5 5202	6.40—Hunter
1	12	1	ST CATHRNS	ONT	WE5 5202	2.40—Hunter
1	12	1	QUEBEC	QUE	692 1657	2.20—Lakue
1	12	1	NEW YORK C	NY	WH4 5740	2.00—McKenzie
1	12	1	CLEVELAND	OHIO	TO1 7800	1.90—Maikie
2	12	1	S S MARIE	ONT	AL6 2201	3.50—Burge
2	12	1	NIAGARA LK	ONT	468 3236	2.80—Labonte
2	12	1	ST CATHRNS	ONT	MU2 0521	2.80—L. Baker
2	12	1	ST CATHRNS	ONT	MU4 9461	3.60—Gordon
2	12	1	ST CATHRNS	ONT	MU4 6571	2.80—Lakue
2	12	1	ST CATHRNS	ONT	MU4 6571	3.20—Hunter
2	12	1	ST CATHRNS	ONT	MU4 6571	6.0—Quail

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**Letter dated May 11, 1967 from Mr. Burnside  
to Mr. Webster**

[Letterhead of]

THE ST. LAWRENCE SEAWAY AUTHORITY  
ADMINISTRATION DE LA VOIE MARITIME DU SAINT-LAURENT

P. O. Box 98,  
Cornwall, Ontario.

May 11, 1967.

Mr. Donald D. Webster,  
Coles & Goertner,  
1000 Connecticut Avenue, N.W.,  
Washington, D. C. 20036

Dear Mr. Webster:

Further to my letter of May 5th, I now enclose for your information a copy of my letter to the Bell Telephone Company requesting that a search be made of their records respecting a call on December 1, 1964, between 932-5170, Cornwall, and New York—Whitehall 4-5740.

You will note from the Company's reply—copy enclosed—that they retain these records for a very short time only and are not in a position to give us the required information.

Yours very truly,

R. J. BURNSIDE  
R. J. Burnside,  
Director of Operations.

Enclosures

cc: Mr. Barefoot Sanders

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**Letter dated May 3, 1967 from Mr. Burnside to  
Mr. Holtby, Cornwall, Ontario**

P. O. Box 98,  
Cornwall, Ontario.

May 3, 1967.

Mr. L. M. Holtby,  
Manager,  
Bell Telephone Company of Canada,  
P. O. Box 909,  
Cornwall, Ontario.

Dear Mr. Holtby:

In a current court case, conflicting evidence was presented as to whether a certain telephone call was made from our Cornwall Seaway Headquarters office, Telephone WE 2-5170 (5172) to New York—Whitehall 4-5740—on December 1, 1964.

It would be very much appreciated if you would be good enough to search your records for December 1st and 2nd, 1964, and send to me any evidence you may find of such a call being made on either of those dates.

Yours very truly,

Original Signed by

R. J. BURNSIDE  
R. J. Burnside,  
Director of Operations.

RJB/dir

320a

**Letter dated May 5, 1967 from Mr. Holtby  
to Mr. Burnside**

S. L. S. A.—RECORDS  
FILE NO.  
ZAMBEZI

**THE BELL TELEPHONE COMPANY OF CANADA**

Office of the manager  
932-7525

Cornwall, Ontario  
May 5, 1967

Mr. R. J. Burnside  
Director of Operations  
The St. Lawrence Seaway Authority  
P. O. Box 98  
Cornwall, Ontario

Dear Sir:

Your letter of May 3rd 1967 requested evidence of a telephone call between 932-5170 and New York Whitehall 4-5740 in December 1, 1964.

We regret that records of calls made in 1964 are no longer on file. Records of calls are rarely retained beyond a three month period.

Yours truly,

L. M. HOLTBY  
Manager

Refer Initial Date  
R. J. B.

File Chgd to  
R. J. Burnside

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**Letter Dated April 26, 1967 From Coles & Goertner  
to the Honorable Howard F. Corcoran, U. S. D. J.**

[Letterhead of]

**COLES & GOERTNER  
ATTORNEYS AND COUNSELLORS AT LAW  
1000 CONNECTICUT AVENUE, N. W.  
Washington, D. C. 20036**

April 26, 1967

Honorable Howard F. Corcoran  
Judge of the United States Court  
for the District of Columbia  
Washington, D. C. 20001

Re: *Orient Mid-East Lines, Inc. v. CARE, et al.*  
U. S. District Court for the District of  
Columbia, Nos. 6-65, 7-65, 22-65, 34-65

Dear Judge Corcoran:

During the trial of the subject consolidated cases the question arose as to how much plaintiff recovered under its insurance policy covering cargoes which the ORIENT MERCHANT did not load (*i.e.*, shut out) and which plaintiff had shipped by rail to a port outside of the Lakes for loading on its ship. Mr. Pendas testified that he was not sure of the amount collected. A telephone call to his New York office developed the information that Orient Mid-East Lines collected \$34,050.10 under the policy and that information was put in the trial record.

Because of a remaining uncertainty as to exactly how much was recovered under the policy, we indicated in open court that we would attempt to obtain documentary proof



*Letter Dated April 26, 1967 From Coles & Goertner  
to the Honorable Howard F. Corcoran, U. S. D. J.*

of the exact amount which Orient Mid-East Lines collected under that policy. Enclosed is a Xerox copy of a "Memorandum of Collections Effected" from Frank B. Hall & Company, Inc., to Eagle Ocean Transport, Inc., agent for Orient Mid-East Lines, stating that the insurance company paid under the ORIENT MERCHANT cover note \$36,174.78 as "amount due from underwriters for claim for cargo-forwarding expense".

I have furnished Mr. van Emmerik a copy of this "Memorandum of Collections Effected" and have asked him to consent to its introduction into evidence. He has withheld his consent and will, I assume, be in touch with you if he objects to its introduction. Nevertheless, we respectfully request that you receive it in evidence as plaintiff's next exhibit.

Very truly yours,

COLES & GOERTNER  
Attorneys for Orient Mid-East Lines, Inc.

DONALD D. WEBSTER  
Donald D. Webster

Enclosure

cc: Allen van Emmerik, Esquire (with enc.)

bc: Wharton Poor, Esquire  
Stanley O. Sher, Esquire  
Mr. O. Pendias

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**Memorandum of Collections Effected  
Under Insurance Policy**

[Letterhead of]

FRANK B. HALL & CO., INC.  
67 Wall Street, New York 5, N. Y. • WHitchall 4-3300

To: Eagle Ocean Transport, Inc.  
29 Broadway  
New York, New York 10006

RECEIVED  
AUG 28 1965  
Answered

MEMORANDUM OF COLLECTIONS EFFECTED:

PAYEE:

ORIENT MID-EAST LINES' AND EAGLE OCEAN TRANSPORT, INC.

ASSURED:

ORIENT MID-EAST LINES' AND EAGLE OCEAN TRANSPORT, INC.

CLAIM No.: 6333	VESSEL:	"ORIENT MERCHANT"
	ACCIDENT	Insurance on Interest
	AND DATE	Additional Expenses at-
		taching Noon,
		November 12th, 1964, GMT

.....

For amount due form Underwriters for Claim for	
Cargo Forwarding Expense .....	\$36,174.78
Less: Collecting Commission .....	361.74
	<u>\$35,813.04</u>

PAID  
AUG 27 1965  
FRANK B. HALL & Co., INC.

**Letter Dated May 4, 1967 from Allen van Emmerik  
to the Honorable Howard F. Corcoran U. S. D. J.**

[Letterhead of]

UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D. C. 20530

May 4, 1967

Honorable Howard F. Corcoran  
Judge of the United States  
District Court for the  
District of Columbia  
Washington, D. C. 20001

Re: Orient Mid-East Lines, Inc. v. CARE  
and United States  
District of Columbia, Civil No. 6-65,  
and consolidated cases, Civil Nos.  
7-65, 22-65 and 34-65

Dear Judge Corcoran:

On April 27 I wrote to Your Honor objecting to the introduction into evidence of a xerox copy of Frank B. Hall's Memorandum of Collections Effected, undated but marked paid August 27, 1965. At the invitation of opposing counsel I have inquired of Frank B. Hall & Co. concerning these objections.

I am satisfied as to all objections except No. 4; the Hall firm has no information concerning numbers of tons railed. Accordingly, this will stipulate for the United States that plaintiff was paid the total amount of \$36,174.78 under its policy. This will further stipulate that no other claims were made under that policy evidenced by the Cover Note in evi-

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*Letter Dated May 4, 1967 from Allen van Emmerik  
to the Honorable Howard F. Corcoran U. S. D. J.*

dence, No. 76733. In view of this stipulation, it seems unnecessary to admit the Memorandum of Collections itself into evidence, but I have no objection.

Very truly yours,

Allen van Emmerik  
Attorney

*Letter Dated May 4, 1967 from Allen van Emmerik  
to the Honorable Howard F. Corcoran U. S. D. J.*

cc: David G. Bress, Esquire  
United States Attorney  
Washington, D. C. 20001

Attention: E. Grey Lewis, Esquire  
Assistant United States Attorney

cc: Marvin J. Coles, Esquire  
Donald D. Webster, Esquire  
Messrs. Coles & Goertner  
1000 Connecticut Avenue, N. W.  
Washington, D. C. 20036

cc: Stanley O. Sher, Esquire  
818 18th Street, N. W.  
Washington, D. C. 20006

cc: Wharton Poor, Esquire  
Messrs. Haight, Gardner, Poor & Havens  
80 Broad Street  
New York, New York 10004

bcc: Department of Agriculture  
Office of the General Counsel  
Washington, D. C. 20250

(Your Ref: HBP:RTI 202-6-304)

bcc: Department of State  
Agency for International Development  
Washington, D. C. 20523

Attention: Leslie A. Grant, Esquire  
Deputy General Counsel

Opinion of Judge Corcoran Dated July 31, 1967

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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District Court Nos. 6-65, 7-65, 22-65, 34-65  
(Consolidated)

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ORIENT MID-EAST LINES, INC.,

*Plaintiff*

*v.*

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
CHURCH WORLD SERVICE, INC., and LUTHERAN WORLD  
RELIEF, INC.,

*Defendants*

*and*

UNITED STATES OF AMERICA,

*Defendant-Intervenor*

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OPINION

This consolidated action is in the nature of a libel in admiralty for money due on bills of lading.

I. THE PARTIES

The plaintiff Orient Mid-East Lines, Inc. is incorporated under the laws of Panama. At all times pertinent hereto it was the owner of the S.S. ORIENT MERCHANT and the time-charterer of the M.S. OLAU GORM.

*Opinion of Judge Corcoran Dated July 31, 1967*

The defendants, Cooperative for American Relief Everywhere, Inc. (CARE), Seventh Day Adventist Welfare Service, Inc., Church World Service, Inc., and Lutheran World Relief, Inc., are volunteer relief agencies to which the Commodity Credit Corporation (an agency of the United States) donated agricultural products under authority of 7 U. S. C. 1431 for shipment abroad.

The United States, defendant-intervenor, entered the case with the consent of all parties as the real party in interest since it is required to pay all freight charges incident to any shipments of agricultural products donated to the defendant volunteer agencies (7 U. S.C. 1723; 32 C. F. R. 202.2).

## II. THE DISPUTE

In the Fall of 1964 the defendant relief agencies entered into contracts of carriage (bills of lading) with the plaintiff carrier to transport U. S. donated agricultural commodities from Great Lakes ports to points overseas.

The route of ocean going vessels from the Great Lakes to the open sea is, of course, the St. Lawrence Seaway. Due to icing, the Iroquois Lock\* of the Seaway was officially closed at midnight December 5, 1964, before the OLAU GORM and the ORIENT MERCHANT could make their way through it.\*\* As a result the two ships were locked in the Lakes and ordered to Toronto for winter berthing.

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\*The Iroquois Lock is located near Prescott, Ontario and is the exit lock from Lake Ontario, the easternmost of the Lakes, into the Seaway.

\*\*Two other vessels were locked in the Lakes during 1964, a Chinese-flag vessel, the VAN FU, and an American-flag vessel, the FLYING INDEPENDENT.

*Opinion of Judge Corcoran Dated July 31, 1967*

The plaintiff thereupon, on or about December 9, 1964 telegraphed to the various shippers:

"THIS IS TO ADVISE YOU THAT BECAUSE OF FORCE MAJEURE THE ORIENT MERCHANT AND OLAU GORM ARE UNABLE TO LEAVE THE LAKES AS A CONSEQUENCE OF THE CLOSURE OF THE ST. LAWRENCE SEAWAY. THE VOYAGE HAS THUS BEEN TERMINATED AND THE FREIGHT EARNED. IN ACCORDANCE WITH YOUR REQUEST WE WILL LEAVE THE CARGO ON BOARD THE VESSELS DURING THE WINTER MONTHS. WE SHALL BE GLAD TO DISCUSS WITH YOU THE ADJUSTMENT OF A NEW FREIGHT TO APPLY FOR THE NEW VOYAGE."\*

The above quoted notice by the plaintiff claiming a right to payment of full freight was founded upon the following pertinent clauses of the bills of lading:

"5. In case of war, hostilities, . . . ice or closure by ice, or the happening of any other matter or event, whether of like nature to those above mentioned or otherwise, whether any of the foregoing are actual or threatened and whether taking place at or near the port of discharge or elsewhere in the course of the voyage and whether or not existing or anticipated before commencement of the voyage, which matters or events, or any of them, in the judgment of the Master or carrier may result in damage to or loss of the vessel . . ., or make it unsafe or

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\*This telegram was sent to CARE and Church World Service. Except for omission of reference to the OLAU GORM, the same telegram was sent to the Seventh Day Adventists and Lutheran World Relief.



*Opinion of Judge Corcoran Dated July 31, 1967*

imprudent for any reason to proceed on or continue the voyage or enter or discharge cargo at the port of discharge, or give rise to delay or difficulty in reaching, discharging at or leaving the port of discharge, the carrier or Master may . . . (2) whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, discharge the goods into depot, lazaretto, craft, or other place; or (3) proceed to return, directly or indirectly, to or stop at any port or place whatsoever, in or out of the regular route and short of or beyond the port of discharge as the Master or the carrier may consider safe or advisable under the circumstances and discharge the goods, or any part thereof at any such port or place. When the goods are discharged from the ship, as herein provided, they shall be at the risk and expense of the shippers and/or receivers; such discharge shall constitute complete delivery and performance under this contract, full bill of lading freight and charges shall be deemed earned and the carrier shall be freed from any further responsibility. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation, for which, together with any unpaid freight and charges, the carrier shall have a lien on the goods.

" . . .

"13. The term of this bill of lading constitute the contract of carriage . . .

" . . .

*Opinion of Judge Corcoran Dated July 31, 1967*

"31. Full freight hereunder to port of discharge or port of destination, if named, shall be considered completely earned on receipt of the goods by the Carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatsoever ships and/or cargo lost or not lost.

"If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere, any forwarding of the goods or any part thereof by vessels of the same line or otherwise shall be at the risk and expense of the goods."

Lutheran World Relief had prepaid the freight on its shipments prior to the icing-in. CARE, Church World Service and Seventh Day Adventist had not prepaid but had executed "due bills" acknowledging receipt of bills of lading which Orient Mid-East marked "freight prepaid." These due bills provided in part:

"Receipt is hereby acknowledge [sic] of Prepaid, negotiable sets of Bills of Lading per                      numbered as follows without payment of freight, and in consideration of the acceptance by Orient Mid-East Lines of this Due Bill, it is herewith expressly agreed to pay ocean freight charges in U. S. Currency as undernoted within seventy-two hours after date, the vessel to have a lien on the cargo for full amount of ocean freight charges plus any expenses incidental to the collection thereof until payment has been effected."

*Opinion of Judge Corcoran Dated July 31, 1967*

Following the berthing of the ships in Toronto, a dispute arose as to the freight due under the bills of lading and the due bills.

The shippers and carrier thereupon entered into negotiations which resulted in an agreement dated March 3, 1965. The parties have stipulated to the following summary of that agreement:

"CARE, Church World Service, Seventh Day Adventists and Lutheran World Relief, having requested Orient Mid-East to retain the cargo on board throughout the period the vessels would be locked into the Lakes,\* undertook to surrender the bills of lading originally issued and to pay the carrier the full freight due under the bills of lading first issued unless such freight had already been paid. Orient Mid-East, on its part, undertook to have new, second bills of lading issued, . . . and agreed that the OLAU GORM and ORIENT MERCHANT would perform the voyages in accordance with the terms of the second bills of lading when the Seaway opened for navigation in the Spring of 1965. The parties also agreed that if they were unable later to agree upon the amounts, if any, due the carrier in addition to the freight already paid, any party could institute suit in a United States court of competent jurisdiction for resolution of that issue 'all parties retaining all rights and defenses they presently have, and this

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\*Throughout the period when the ORIENT MERCHANT and OLAU GORM were berthed at Toronto, plaintiff stored and cared for the cargo, and informed defendants that it was rendering services thereto. During trial the Government conceded that by storing and caring for the cargo on board, plaintiff rendered a valuable service to defendants. The question of how much plaintiff is entitled to recover for these services is not presently before the Court but will be considered in later proceedings.

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agreement, issuance of the second bills of lading, and the payment provided for in article 1 above shall not be deemed to affect, waive or alter the rights or defenses of any party.' They also agreed therein that 'the failure of the Carrier physically to exercise any of its claimed rights, including the asserted right to discharge at Great Lakes ports or elsewhere, shall not be deemed to affect or diminish the amounts and/or remuneration to which the Carrier may be entitled under the contracts of carriage as evidenced by the second bills of lading and/or the bills of lading first issued.' "

Defendants CARE, Church World Service and Seventh Day Adventists thereafter paid the freight due under the first bills of lading on dates and in the amounts indicated below:

	<u>Date</u>	<u>Amount</u>
CARE .....	March 16, 1965	\$202,601.32
Church World Service .....	March 10, 1965	165,968.64
Seventh Day Adventists .....	March 19, 1965	11,694.92

Lutheran World Relief, as pointed out above, had prepaid the freight it owed in the amount of \$2,589.42.

The compromise having been reached the OLAU GORM sailed from the Great Lakes in April 1965 and completed her voyage as originally intended without incident.

The ORIENT MERCHANT cleared Toronto, loaded additional cargo for the defendant agencies at other Great Lake ports, but thereafter on April 27, 1965 ran aground. Her cargo was off-loaded in Toronto and the ship was declared a constructive total loss.

The basic dispute arising out of the facts as recited is over the question of so-called "second freight."

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The plaintiff carrier asserts that since its ships were closed in by ice it is entitled under Paragraphs 5 and 31 of the bills of lading not only to what the parties have designated as "first freight" (i.e., the freight paid in connection with the original loading of the vessels) but also to what the parties have designated as "second freight" (i.e., an additional freight for completion of the voyage from Toronto).

The defendant United States claims that notwithstanding the exculpatory provisions of the bills of lading the carrier is entitled to the "first freight" only and has no valid claim to an additional "second freight." Its position is that although the plaintiff vessels were locked in the Lakes as a result of ice, the plaintiff was at fault in that it acted in total disregard of repeated warnings from the Seaway Authority to clear the ships before ice set in, that the plaintiff gambled unreasonably on the weather, and having lost the gamble, cannot now shift the risk to the shippers notwithstanding the exculpatory provisions of the bills of lading.

Both parties concede that there is a degree of negligence which might thwart the strict application of the exculpatory provisions of the bills of lading. The parties are in dispute, however, as to whether there is in fact negligence in this case, and if so whether that negligence is of a sufficient degree to have the effect of defeating the provisions of the bills. We turn accordingly to a more detailed review of the circumstances which led to the lock-in of the two ships.

The St. Lawrence Seaway is operated by the St. Lawrence Seaway Authority, a Canadian instrumentality headquartered at Cornwall, Ontario. It is solely responsible for deciding when conditions require closing of the Seaway.

On November 2, 1964 the Seaway Authority issued "Notice No. 10 of 1964" to all carriers listing the formal

*Opinion of Judge Corcoran Dated July 31, 1967*

closing dates of the various Seaway canals between locks. It designated November 30, 1964 as the closing of the Iroquois Canal, but further added that "weather and ice conditions could force the Seaway to be closed earlier." The notice stated further that if climatic conditions permitted operations would be continued past the stated date but "... obviously subject to close on very short notice." Further the notice stated:

"Masters and owners of ocean vessels are advised that it is their responsibility to schedule their passage to ensure clearing the South Shore Canal at St. Lambert before the closing date if they wish to avoid being forced to winter above Montreal, should an early freeze occur this year, as it has in a number of years past."

The year 1964 was predicted to be, and, as it turned out, was a severe year, more so than previous years. By November 25 the concern of the Seaway Authority was such that it telegraphed all registered agents of carriers operating in the Great Lakes requesting information on expected departures of their ships. This telegram was sent to the Hurum Shipping and Trading Company, Ltd., plaintiff's Canadian agent. It read:

"CORNWALL ONT 25 1129 AM EST

"HURUM SHIPPING BOARD OF TRADE BLDG  
300 ST SACREMENT ST MTL QUE  
IN THE BEST INTERESTS OF ALL CONCERNED  
WE RESPECTFULLY REQUEST ETA OF OCEAN  
VESSELS FOR SEAWAY TRANSIT RE APPROACH-  
ING CLOSING OF THE 1964 NAVIGATION  
SEASON 1 ETA UPBOUND ST LAMBERT LOCK  
ONE 2 ETA DOWNBOUND PORT COLBORNE .

*Opinion of Judge Corcoran Dated July 31, 1967*

LOCK EIGHT 3 ETA DOWNBOUND IROQUOIS  
LOCK SEVEN\*

D MACKENZIE  
ST LAWRENCE SEAWAY AUTHORITY

ETA 1964 1 ETA 2 ETA 3ETA  
NOV 25/64/1145AKN  
TALASHIP MTL"

Hurum Shipping replied:

"ST LAWRENCE SEAWAY AUTHORITIES  
ATT MR D MACKENZIE  
CORNWALL ONTARIO

"REYOUR CABLE VESSELS TRANSIT STOP  
UPBOUND NIL STOP DOWNBOUND MS  
MALMANGER ETA IROQUOIS NOV 27/28TH  
AND MT PONTOS ETA IROQUOIS NOV 28TH STOP  
REGARDING ORIENT MERCHANT AND  
OLAU GORM PRESENTLY IN LAKES CONTACT  
OUR PRINCIPALES ORIENT MID EAST LINES  
NEW YORK [Emphasis supplied]

HURUM SHIPPING AND TRADING  
BOARD OF TRADE BLDG  
MONTREAL PQ"

The Seaway Authority then made telegraphic inquiry of  
Orient Mid-East Lines and was notified on November 25:

"YOURS TODAY ETAS 1 NONE 2 OLAU GORAM  
SEVENTH ORIENT MERCHANT SIXTH 3

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\*ETA upbound St. Lambert Lock means expected time of arrival upbound at St. Lambert Lock which is the Lock nearest Montreal. ETA downbound Port Colborne, Lock 8, means the expected time of arrival at the Lock at Port Colborne on the Welland Canal on the Lake Erie side of the Welland Canal. ETA downbound Iroquois Lock, No. 7, means the expected time of arrival, downbound, at Iroquois Lock which is the first lock through which a vessel passes when leaving Lake Ontario through the Seaway to Montreal.

*Opinion of Judge Corcoran Dated July 31, 1967*

OLAU GORM EIGHTH ORIENT MERCHANT  
SEVENTH RESPECTFULLY REQUEST  
IMMEDIATE ADVICES EVENT AUTHORITIES  
DECIDE CLOSE SEAWAY SOONER IN ORDER  
ATTEMPT ALTER ARRANGEMENTS."

This reply is conceded to mean that Orient Mid-East had no ships upbound or entering the Lakes; that the expected time of arrival of the OLAU GORM at the Port Colborne Lock on the Lake Erie side of the Welland Canal (between Lakes Erie and Ontario) was December 7, 1964; that the expected time of arrival of the ORIENT MERCHANT at Port Colborne Lock was December 6, 1964; that the OLAU GORM was expected to arrive at Iroquois Lock on December 8, 1964 and the ORIENT MERCHANT on December 7, 1964.

The plaintiff's request for "immediate advices event Authorities decide close Seaway sooner" is of special significance because the plaintiff steadfastly maintains that it was entitled to and did place almost total reliance on this request in scheduling the departures of the OLAU GORM and the ORIENT MERCHANT.\*

There was no further direct exchange of telegrams between the Seaway Authority and the plaintiff.

As any shipping season draws to a close, it is customary for the Seaway Authority to keep carriers apprised of the impending closing of the Seaway by sending telegrams to the Shipping Federation of Canada (representing the ocean

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\*The plaintiff also asserts reliance on the fact that the tentative date for closing in previous years had always been November 30, but in fact the canals had remained open and that actual freezing dates had always been later than December 5. Since closing is directly related to prevailing weather—and weather is not yet precisely predictable—the Court deems this reliance to be patently unreasonable.



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trade)\* and to the Dominion Marine Association (representing the inland trade).

The telegrams include a comparison of current water temperatures with those on the same date in the previous year. The most critical temperatures are those at the St. Lambert Lock. The telegrams also show the number of vessels remaining in the Lakes above St. Lambert because of the effect this may have on the time necessary to exit the Seaway and to avoid a line-up at one end of the Seaway.\*\*

In the course of November and December 1964 the following information was released to the trade:

<u>Date of Advice</u>	<u>Water Temperatures</u>		<u>No. of Ocean Ships Above St. Lambert</u>
	<u>1963</u>	<u>1964</u>	
November 23	44.0 F°	36.0 F°	93
November 25	43.0 F°	34.5 F°	123
November 26	41.0 F°	35.0 F°	119
November 27	41.0 F°	34.5 F°	113
November 30	40.0 F°	34.5 F°	83
December 2	36.0 F°	32.0 F°***	67
December 4	34.0 F°	32.0 F°***	39

A telegram of November 26, 1964 to the Shipping Federation of Canada demonstrated a greater than normal urgency. It stated in part:

"... The St. Lawrence Seaway Authority has issued an urgent warning to ocean vessels to make arrange-

\*As noted at p. 9, *supra*, Hurum Shipping, plaintiff's Canadian agent, was a member of this Federation.

\*\*The Seaway reportedly can hold about 30 ships per day (15 in each direction) at the St. Lambert end but cold weather may greatly reduce this number.

\*\*\*No measurements are taken below 32° - freezing point.

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ments to clear the system by the official closing date, November 30, previously announced.

"... A continuance of present weather trends could bring about a forced closing on very short notice.

"Thus, it is important, particularly to ocean ships, in order that they may avoid the possibility of being trapped in the Great Lakes, to take into account present climatic conditions and to schedule their departure from Seaway waters accordingly."

Additionally a telegram of December 4, 1964 warned:

"ICE IS SLOWING SHIP TRANSITS AT ST. LAMBERT."

Trade journals carried articles on the imminent Seaway closing.

Mr. Orestes Pendas, General Manager of the Orient Mid-East Lines, was charged with the routing of the OLAU GORM and the ORIENT MERCHANT. There seems to be no doubt that he had access to all the information indicated above. Further, Captain John Butt, Senior Ship Inspector of the Seaway Authority, testified that he telephoned Eagle Ocean Transport, plaintiff's agent in New York on December 1 on instructions of Mr. Burnside, the Director of Operations, and advised the plaintiff to "get his ships on the move to get out of the Seaway." Mr. Pendas denied such a call\* but acknowledge that he placed a telephone call to the Seaway on December 2, 1964.

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\*The fact that such a call did take place is corroborated by other evidence. A switchboard operator's work sheet and a telephone bill both show a call made from the Seaway Authority on December 1, 1964.

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The undisputed call of December 2nd was taken by Mr. Donald MacKenzie, Special Assistant to the Director of Operations of the Seaway. He testified that he advised Pendas in the course of what conversation "that if these ships were mine I would not want them farther away than Port Colborne and on their way downbound.\*

In the meantime the ships were proceeding as follows: The ORIENT MERCHANT was taking on cargo at Milwaukee as late as November 26, 1964. It cleared Milwaukee for Chicago November 27th. It took on cargo at Chicago leaving on December 1st, but then returned to Milwaukee for still more cargo. It arrived Milwaukee December 2nd and departed December 3rd. It arrived Detroit December 5 and at Port Colborne December 6th. It did not reach the Iroquois Lock until December 7.

The OLAU GORM arrived Milwaukee November 23 and cleared for Chicago on November 25. It departed Chicago November 29, arriving at Green Bay November 30. It departed Green Bay December 1 and arrived Buffalo December 5 to take on additional cargo. It left Buffalo 10:55 P. M. December 5 and stopped at Kingston December 7 before proceeding to Iroquois Lock at Prescott.\*\*

The Seaway Authority reached its decision to close finally on December 5 and began broadcasting at 2:00 P. M. that date and at four-hour intervals that the Seaway would

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\*Mr. Pendas understood that Mr. MacKenzie gave him no encouragement to keep the vessels in the Lakes, but according to Mr. Pendas' testimony he was led to believe that if he met his planned exit dates he would be allowed to transit the Seaway. The testimony is contrary to all other evidence showing concern by the Seaway authorities of an early freeze-up.

\*\*When Mr. Pendas requested immediate advice on closure of the Seaway he did not specify that he would need four days advance notice.

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close at midnight December 5. Orient Mid-East asserted that neither ship heard these broadcasts.

The last downbound ship to transit Iroquois Lock cleared December 6 at 0048 hours. The last downbound ship cleared the Seaway at St. Lambert on December 7, 1964.

### III. DISCUSSION

Historically, maritime law made the carrier of goods by sea absolutely responsible for safe delivery of the cargo unless loss or damage or nondelivery was caused by an Act of God, or of a public enemy, or by the inherent vice of the goods provided that in any such exceptional case the carrier was not negligent or otherwise at fault.\* The natural consequence of that principle is that ocean freight charges are not earned unless and until the goods are delivered to their intended destination. *Alcoa S.S. Co. v. U.S.*, 338 U. S. 421 (1949); *Grammer S.S. Co. v. James Richardson & Sons*, 37 F. 2d 366 (W. D. N. Y. 1929) *aff'd* 47 F. 2d 186 (2d Cir. 1931).

Because of the harsh consequences of this rule of absolute liability carriers began inserting exceptive or exculpatory clauses into bills of lading. Contractual provisions establishing the shipper's liability for freight regardless of actual delivery have now become common in bills of lading and have uniformly been held valid. *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377 (1919).

However, from the outset the courts have held that the exemptions from liability conferred by such clauses are subject to the overriding obligation on the part of the carrier

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\*Carver, *Carriage of Goods by Sea* (9th Ed. 1952); Gilmore and Black, *The Law of Admiralty*, at 119 (1957).

*Opinion of Judge Corcoran Dated July 31, 1967*

to use due care in respect to cargo and to furnish a seaworthy ship at the inception of the voyage.\*

The bills of lading here in dispute include accepted exculpatory provisions (*supra*) and on their face such provisions would appear to offer absolute protection to the carrier under the circumstances of this case, i.e., a lock-in by reason of ice. However, even the plaintiff acknowledges that absolute protection does not exist and that its claims could be defeated by a showing that the plaintiff's ships were locked in because of the plaintiff's reckless or arbitrary conduct. The defendants on the other hand would assert that the plaintiff must exercise the skill of a reasonably prudent carrier under all the circumstances before it can retain freight while abandoning the voyage, and that the plaintiff may not rely upon circumstances of which it was or should have been aware as grounds for excusing the nonperformance of the voyage.\*\*

Significantly both parties cite the same cases in many instances to support their respective positions, and it is true that language can be isolated from the various cases which would seem to afford some comfort to both. Upon analysis of all the leading cases, however, the Court deduces that there is a common standard of conduct prescribed if a carrier is to be afforded the protection of the exculpatory

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\*Gilmore & Black, *op. cit. supra* at 120.

\*\*Interestingly, the plaintiffs, while insisting that liability can only attach to gross negligence—or arbitrary or reckless conduct—asserts that even if the standard of care is ordinary negligence the facts will show that the frustration of the voyage was a result of ice closure and that there was no negligence on the part of the carrier. Possibly out of an abundance of caution the defendants too modify their stand to assert that while the standard of care is one of the ordinary negligence, the plaintiff was in fact grossly negligent and acted recklessly and arbitrarily. Each side also seeks to cast the burden of proof upon the opposing party.

*Opinion of Judge Corcoran Dated July 31, 1967*

provisions. The Court finds that standard to be that to afford itself the protection of the exculpatory clauses of the bills of lading the carrier must exercise reasonable judgment under the circumstances existing and reasonably foreseeable at the time the judgment is made. In other words the exculpatory clauses do not confer a license to disregard the likely or the obvious.

This standard is not inconsistent with that set forth in *De La Rama S. S. Co. v. Ellis*, 149 F. 2d 61 (9th Cir. 1945), which is cited by the plaintiff as "perhaps the most illuminating discussion of the standard by which a carrier's conduct should be measured." That case is illuminating but we do not hold to the plaintiff's contention that it stands for the proposition that anything short of gross negligence or arbitrary or reckless conduct would exculpate the carrier. In that case the bill of lading contained a prepaid freight clause purporting to shift the risk of forced abandonment of the voyage from the carrier to the shipper. The carrier continued to load a shipment at New York destined for the Philippines after receipt of the news of the attack on Pearl Harbor. After the cargo was loaded the customs authorities refused to clear the vessel. The cargo was unloaded and the voyage abandoned. In the ensuing litigation the District Court held that it was unreasonable on the part of the carrier to continue loading in view of the news of Pearl Harbor, but the Court of Appeals reversed and stated:

"We are not able to agree that the responsible agents of the carrier acted *arbitrarily* in light of the facts coming to their knowledge . . ." (Emphasis supplied).

The appellate court considered the judgment of the carrier to be a reasonable one under the circumstances since at the time that the decision had to be made whether to

*Opinion of Judge Corcoran Dated July 31, 1967*

proceed with or to abandon the voyage the public mind was unprepared for the swift deterioration which was to take place. In using the word "arbitrarily" the appellate court did not thereby adopt such a standard as is advanced by the plaintiff. As a matter of fact and significantly the Court stated:

"What the shipper had the right to demand of the carrier was, not infallibility, but the exercise of a *reasoned judgment of the situation as it appeared at the moment*, having regard to the rights of all concerned." citing *The Styria*, 186 U. S. 1 at 9-10 (1902), *The Wildwood*, 133 F. 2d 765 (9th Cir. 1943). (Emphasis supplied)

In considering whether the exercise of judgment is reasonable under all the circumstances the Court should, as was done in *The Wildwood*, *supra* at 771, place some reliance on what effort is made to obtain necessary and available information upon which a reasoned judgment can be made.

The same principle of "reasoned judgment" under the circumstances as they exist or as are reasonably foreseeable at the time the judgment is made permeates all the other leading cases cited by either party. Thus, a deviation may be reasonable and permissive if, *after* a voyage is commenced, unforeseen circumstances arise which would make it imprudent or impossible to continue. *The Wildwood*, 133 F. 2d 765 (9th Cir. 1943); *Hirsch Lumber Co. v. Weyerhaeuser S.S. Co.*, 233 F. 2d 791 (2d Cir. 1956); *Colonial q/f v. Moore-McCormack Lines*, 83 F. Supp. 464 (S. D. N. Y. 1949), *aff'd*, 178 F. 2d 288 (2d Cir. 1949); *De La Rama S. S. Co. v. Ellis*, 149 F. 2d 61 (9th Cir. 1945); *Kroll v. Silver Line*, 116 F. Supp. 443 (N. D. Cal. 1953).

*Opinion of Judge Corcoran Dated July 31, 1967*

However, notwithstanding the existence of exculpatory clauses the courts will not grant protection to a carrier who makes a deviation when the risks encountered were known to the carrier at the commencement of the voyage and the deviation is found to be unreasonable. *Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero*, 213 F. Supp. 97, 102 (S. D. N. Y. 1963), *aff'd*, 324 F. 2d 955 (2d Cir. 1963) (unusual congestion at a distant port of destination).

Nor will the courts grant the protection of an exculpatory clause where a voyage becomes frustrated through the fault of the carrier. *Merchants Corp. of America v. 9655 Long Tons, No. 2 Yellow Milo*, 238 F. Supp. 572 (S. D. Tex. 1965).

#### IV. CONCLUSION

Applying the foregoing principles to the facts at hand the Court can only conclude that the plaintiff Orient Mid-East did not use reasoned judgment in failing to heed the repeated warnings of the impending freeze and in delaying the arrival of its vessels at the critical lock before the freeze actually took place. It will be recalled that Pendias claims to have relied upon the Seaway Authority to answer his request for further information. But Pendias had no right to put the burden on the Seaway Authority. It as a public agency was not required to service individual shippers in this manner.

It is obvious that the Seaway Authority did use every reasonable effort to bring home to carriers and their agents the danger of the freeze that would cause the closure of the Seaway. There is no doubt that these warnings were brought home to the plaintiffs, and there is no doubt that



*Opinion of Judge Corcoran Dated July 31, 1967*

had the plaintiff heeded the warnings both of its vessels would have cleared the Seaway.

Under all the circumstances the Court finds that the plaintiff did not act reasonably and that accordingly the plaintiff is not entitled to the "second freight."\*

H. F. CORCORAN  
H. F. Corcoran  
JUDGE

Dated: July 31, 1967.

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\*By agreement of the parties certain other damage claims have been left open. They will be the subject of further inquiry.

348a

Order Entered July 31, 1967

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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[SAME TITLE]

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ORDER

In accordance with the opinion filed herein dated July 31, 1967, which opinion shall constitute the Court's findings of fact and conclusions of law, it is this 31st day of July, 1967.

ORDERED that insofar as the plaintiff's complaint and demand for damages rests on its entitlement to second freight said complaint is dismissed.

H. F. CORCORAN  
Judge

Supplemental Opinion of Judge Cocoran dated  
February 20, 1968

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

[SAME TITLE]

---

SUPPLEMENTAL OPINION

Reference is made to an earlier opinion of this Court in this matter dated July 31, 1967. By agreement of the parties that initial opinion was limited to a consideration only of alleged liability of the defendant for so-called "second" freights and left open other questions treated below dealing with damages for freight stored and for interest earned.

I.

On October 6, 1967 counsel for the parties met with the Court *in camera* to discuss the conduct of future proceedings concerning the damage claims. In the course of that conference counsel for the plaintiff called the attention of the Court and of Government counsel to Clause 25 of the bills of lading, and suggested that in view of the Court's reasoning in its opinion of July 31, 1967, Clause 25 might be applicable to exculpate the plaintiff from any wrongdoing on its part and thereby entitle it to the so-called "second" freights notwithstanding the earlier findings of the Court. Clause 25 was included in the bills of lading which were originally before the Court, but had never been adverted to at any time either in brief or argument in the course of

*Supplemental Opinion of Judge Corcoran dated  
February 20, 1968*

this protected litigation. In view, however, of the represented importance of the clause (and the parties consenting) the Court agreed to accept briefs on its applicability to the plaintiff's claim to "second" freights.

Clause 25, now in issue, reads as follows:

**"Negligence Clause**

"It is intended that all the terms of this contract including all exemptions from liability shall be valid, enforceable and available to the carrier so far as and whenever the applicable law will permit even where there has been negligence or unseaworthiness for which the carrier is chargeable and that in all instances where it may be possible to contract against the consequences of negligence or unseaworthiness, the Carrier, although negligent, or the ship be unseaworthy. shall not be under any liability whatever."

Applying the foregoing language the plaintiff argues:

- (a) That all bill-of-lading exemptions of liability are valid even when the carrier is proven negligent;
- (b) That this Court has held the plaintiff carrier negligent<sup>1</sup> in this particular case is not clearing the Great Lakes before ice closure and therefore
- (c) The plaintiff's negligence cannot defeat its claim to the second freights.

The Court does not agree.

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<sup>1</sup>The Court's finding that the plaintiff failed to exercise reasoned judgment under all the circumstances, read in context, is hardly to be equated with mere negligence.

*Supplemental Opinion of Judge Corcoran dated  
February 20, 1968*

The plaintiff presents no authority directly in point to support its position but attempts to sustain its theory by analogy to cases arising under the provisions of the Harter Act<sup>2</sup> and the Carriage of Goods by Sea Act<sup>3</sup> (Cosga). In every case cited by the plaintiff to support this position, however, there was a question of the *liability of the carrier* for damage to cargo, for mismanagement of the ship, or for other circumstances excepted by the bills of lading. The Court does not argue with these cases; they clearly fall within the purview of the exceptive clauses of the Harter Act and Cosga. But, and the distinction is controlling, it must be pointed out that there is no issue of *liability of the carrier* or the carrier's ship present in the instant case. No one asserts *liability* against the carrier or its ship. The Court finds a very sharp distinction between a clause granting an *exemption to the carrier from liability* under exceptive circumstances and a situation where a carrier *asserts an affirmative claim of liability* against another for full freight notwithstanding non-performance of the voyage. In the opinion of this Court Clause 25 was never intended to apply to such a situation. The Court accordingly reaffirms its original decision unaltered by the existence of Clause 25.

III.

Throughout the period the ORIENT MERCHANT and OLAU GORM were berthed at Toronto, plaintiff, at the request of the various nominal defendant relief agencies, stored and cared for the cargo aboard ship. The defendants admit these services were beneficial to the cargo. The ques-

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<sup>2</sup>46 U. S. C. §§ 190-195.

<sup>3</sup>46 U. S. C. §§ 1300-1315.

*Supplemental Opinion of Judge Corcoran dated  
February 20, 1968*

tion now presented is how much, if anything, the plaintiff is entitled to recover for performing the services.

At trial the plaintiff took the position that when the freeze-up occurred, the voyage terminated, with full freight earned and that it had the right to off-load the cargo at the nearest available port but that it retained cargo aboard at the behest of the defendants. The plaintiff accordingly alleged that it was entitled to receive for ship storage whatever it would have cost the defendants for shore storage at facilities in Toronto. That claim was of necessity precluded by the Court's holding in its original opinion.

In view of the Court's prior conclusion the plaintiff shifts ground to allege now that it is entitled, in effect, to the cost of storing that portion of the goods which would have been left behind had the plaintiff taken the proper precautions to exit the Seaway prior to the freeze-up. In other words the plaintiff alleges that the defendants benefited by the plaintiff's misconduct to the extent that the defendants were relieved of either over-winter storage at loading point, or overland travel cost to an ocean port for further shipment. This reasoning places a premium on the benefits to the defendants but fails to consider the plaintiff's failure to complete delivery and fails to place any culpability on the plaintiff for its misconduct. This reasoning also overlooks the plaintiff's principal and most obvious economic motive in delaying in the Lakes as long as possible in order to load the greatest amount of cargo. Clearly this was not to relieve the defendants of over-winter storage costs.

The Court is of the opinion that the plaintiff did not have the right to terminate the voyage at Toronto, off-load the cargo and retain the freight paid. During the winter freeze-up the plaintiff had a duty to care for the cargo in a reasonable manner by the least expensive method. It could

*Supplemental Opinion of Judge Corcoran dated  
February 20, 1968*

retain the goods on board its vessels or take some less costly reasonable alternative. When the plaintiff agreed to retain the goods aboard ship at the request of the defendants it therefore became entitled to that amount by which the cost of such storage exceeded the cost of any other reasonable method of custody.

By a recent submission dated February 13, 1968 counsel for the plaintiff have conceded "that the cost to the ship incurred by the need to care for the cargo aboard would not exceed the cost of storage ashore."

This issue is therefore resolved.

IV.

One final issue remains to be treated in this case. The bills of lading issued on each contract of carriage required that freight charges be prepaid. Prior to the freeze-up defendant Lutheran World Relief had prepaid the freight on its shipments. CARE, Church World Service and Seventh Day Adventist had not prepaid their freight charges but had executed "due bills" which are set out in pertinent part on page 5 of the Court's original opinion. Following the freeze-up of the Seaway and closure, the freight charges due under the bills of lading were disputed.

This dispute was resolved by an agreement of March 3, 1965 and the freight was eventually paid on March 10, 16, and 19, 1965 as set forth at page 6 of the original opinion.

These freights were due prior to the ice closure and the plaintiff is entitled to interest at the rate of 6% from the due date of payment under the due bills until the actual date of payment plus all reasonable costs incurred by plaintiff to effect recovery. The parties have stipulated that the plaintiff is entitled to interest in the amount of \$6,083.39

\* \* \*

and collection fees of \$7,460.51, or a total of \$13,543.90.

An order reflecting the above is being entered this 20th day of February, 1968.

H. F. CORCORAN  
Judge

**Final Decree Dated February 23, 1968**

**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

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[SAME TITLE]

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**FINAL DECREE**

Pursuant to the Opinion and Order of this Court dated July 31, 1967, and entered on August 1, 1967, and pursuant to the supplemental Opinion thereto dated February 20, 1968 it is hereby:

ORDERED, ADJUDGED, and DECREED that plaintiff's causes of action for second separate freights for carrying the cargoes here involved and for compensation for the overwinter storage of such cargoes are dismissed; and it is further

ORDERED, ADJUDGED, and DECREED that plaintiff shall recover from defendant United States the sum of \$13,543.90 on plaintiff's cause of action for collection expenses and interest on freights earned for carrying such cargo but not timely paid; together with interest at Four Percent (4%) from March 22, 1965 until paid; and it is further

ORDERED, ADJUDGED, and DECREED that each party shall bear its own costs.

WASHINGTON, D. C., February 23, 1968.

H. F. C.  
United States District Judge



**Notice of Appeal**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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[SAME TITLE]

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**FILED**

**MAR 13 1969**

**ROBERT N. STEARNS**

**NOTICE OF APPEAL**

Notice is hereby given this 13th day of March, 1968, that Orient Mid-East Lines, Inc. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of February, 1968, in favor of Defendants and Defendant-Intervenor denying a second freight and compensation for storage against said Orient Mid-East Lines, Inc.

**COPY TO:**

Lawrence F. Ledebur, Esq.  
Chief, Admiralty & Shipping Section  
Department of Justice

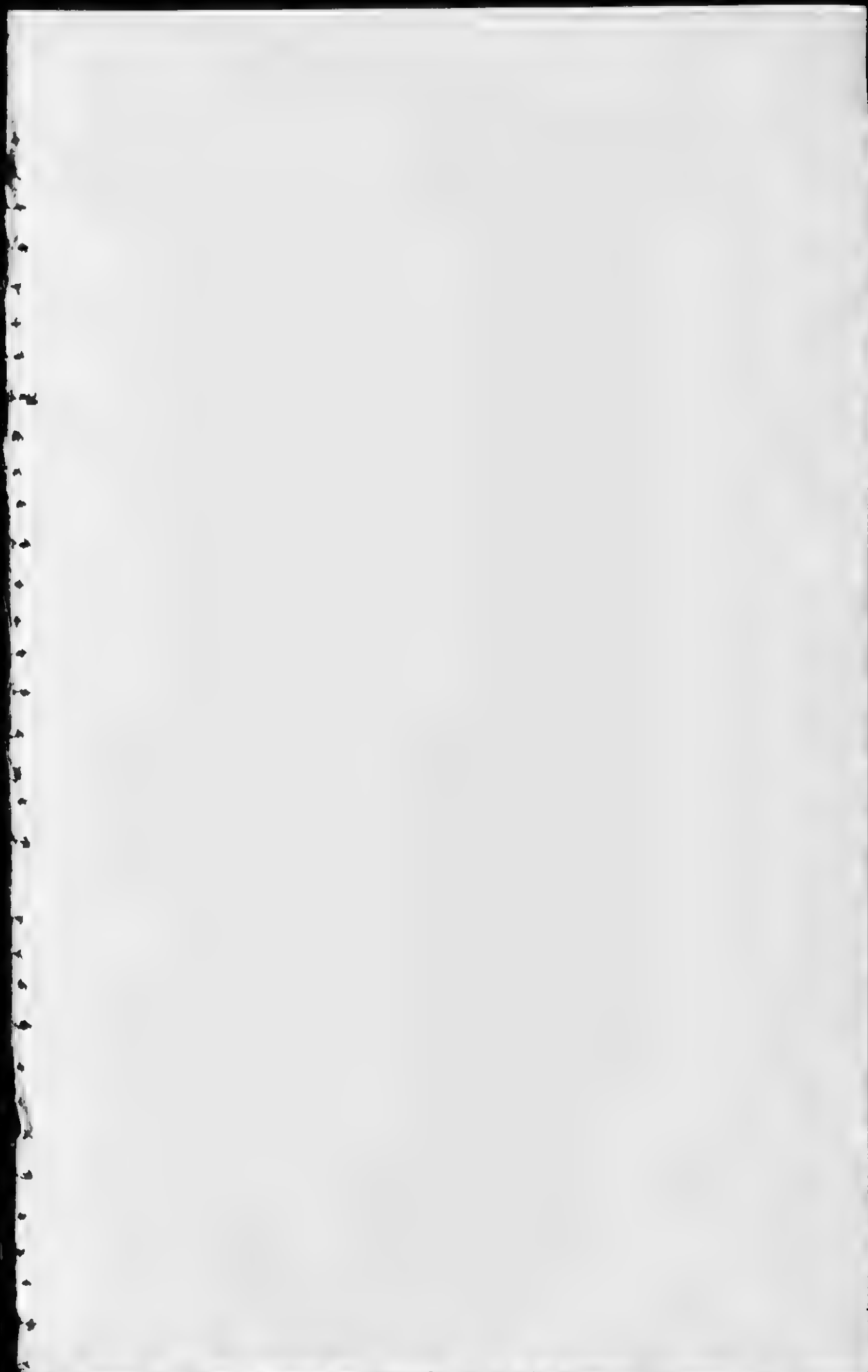
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**Attorneys for Plaintiff**



**BRIEF FOR APPELLANT**

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,833, 21,834, 21,835, 21,836  
(Consolidated)

ORIENT MID-EAST LINES, INC.,  
*Appellant,*

*v.*

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
UNITED STATES OF AMERICA, ET AL.,  
*Appellees.*

On Consolidated Appeal From  
The United States District Court  
For The District of Columbia

WHARTON POOR,  
HAIGHT, GARDNER, POOR & HAVENS  
80 Broad Street  
New York, New York 10004  
United States Court of Appeals  
for the District of Columbia Circuit and

**FILED JUN 7 1968**

STANLEY O. SHER,  
BEBCHICK, SHER & KUSHNICK  
919 Eighteenth Street, N.W.  
Washington, D. C. 20006

*Nathan J. Paulson*  
CLERK

*Attorneys for Appellant*

### QUESTION PRESENTED

The question presented is whether the appellant failed in the exercise of reasoned judgment because it did not sail its two ships, the ORIENT MERCHANT and OLAU GORM, through the Seaway prior to midnight, December 5, 1964, the date of closure, resulting in the ships mentioned being detained in the Great Lakes from December, 1964, until April, 1965.

The District Judge held that had this question been answered in the negative, appellant would be entitled to recover freights and storage charges (J.A. 343a, 345a).

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III. The District Court should have been guided by decision of the U.S. Maritime Administration in the case of the FLYING INDEPENDENT that the detention in the Great Lakes of appellant's two vessels was attributable "to conditions beyond the control of the operator" and not to lack of the "most efficient and economical operation of the vessels." _____	25
IV. Under the provisions of the bills of lading the appellant is entitled to freight in the amount of \$382,854.30 (J.A. 52a) and is also entitled to storage charges in an undetermined amount. The decree of the District Court should be reversed in so far as it denies appellant's claim for freight and storage charges with directions to enter a decree in favor of the appellant for these items when the exact amount has been ascertained. _____	28

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\* Cases chiefly relied upon are marked by asterisks.





IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 21,833, 21,834,  
21,835, 21,836  
(Consolidated)

---

ORIENT MID-EAST LINES, INC.,  
*Plaintiff-Appellant,*  
*-against-*

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
CHURCH WORLD SERVICE, INC., and LUTHERAN WORLD  
RELIEF, INC.,

and

UNITED STATES OF AMERICA,  
*Defendants-Appellees.*

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On Consolidated Appeal From  
The United States District Court  
For The District of Columbia

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BRIEF FOR ORIENT MID-EAST LINES, INC.,  
Plaintiff-Appellant

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**JURISDICTIONAL STATEMENT**

The above-entitled cause was instituted in the United States District Court for the District of Columbia by the

filing of four libels in Admiralty by appellant against Cooperative for American Relief Everywhere, Inc. (C.A.R.E.), Seventh Day Adventist Welfare Service, Inc., Church World Service, Inc., and Lutheran World Relief, Inc., (J.A. 1a, 7a, 12a, 17a, 23a). Subsequently, the United States intervened on the ground that it was the real party in interest (J.A. 28a, 37a).

The libels were based on Maritime contracts in the form of bills of lading under which there had been shipped goods on the appellant's vessels, the ORIENT MERCHANT and OLAU GORM, for carriage from ports on the Great Lakes to ports in the Mediterranean and in the Far East. The District Court had jurisdiction under Title 28 U.S. Code 1333, and this Court has jurisdiction of this appeal under 28 U.S. Code 1291.

These bills of lading which contained the contract of carriage contained an "ice" clause, which provided, in substance, that in case of ice or closure by ice or any other matter or event which in the judgment of the Master or carrier might give rise to delay or difficulty in reaching the port of discharge the carrier or Master might discharge the goods into depot or other place or proceed to return or stop at any port or place whatsoever and discharge the goods. (J.A. 41a, 42a, 43a). The ice clause further provided:—

"When the goods are discharged from the ship, as herein provided, they shall be at the risk and expense of the shippers and/or receivers; such discharge shall constitute complete delivery and performance under this contract, full bill of lading freight and charges shall be deemed earned and the carrier shall be free from any further responsibility."

When the ORIENT MERCHANT and OLAU GORM were unable to leave the Great Lakes because of the closure of the Seaway on account of ice, the appellant was requested by appellees to allow the goods to remain on board and to carry them to destination when navigation

opened some four months later. This the appellant agreed to do pursuant to an agreement that it had the same rights as if it had discharged the goods as provided in the contract of carriage. (J.A. 51a)

In accordance with the provisions of the contract of carriage, appellant claimed to be entitled to a freight from Toronto, where the vessels had spent the winter, and also for a reasonable compensation for allowing the ships to be used as storage warehouses during the winter months. Appellant also asserted a subsidiary claim, which the District Court allowed (J.A. 353a), for interest and expenses incurred arising out of the fact that although three of the appellees had signed due bills promising to pay the freight within four days after loading they did not do so until after a considerable delay, with the result that the appellant became entitled to interest and also to the expense of collecting the amount due.

*No appeal was taken from that part of the judgment by the appellees.*

The above claims arose out of Maritime contracts and hence are within the Admiralty and Maritime jurisdiction of the District Court and of this Court.

#### STATEMENT OF CASE

The appellant is the owner or operator of some ten steamships or motor vessels. (J.A. 162a) It has been engaged in the Great Lakes Trade since the opening of the Seaway in 1959. (J.A. 148a, 154a) Pendias, General Manager of Eagle Ocean Transport, Inc., the plaintiff's General Agent, who had lengthy experience in shipping was in charge of the routing of the ships. (J.A. 144a, 153a)

The Seaway is a most important avenue of commerce, serving large ports in seven Mid-Western states and also ports in Canada. The total amount of cargo passing

through the Seaway in 1964 totaled 55,779,000 tons. In order to serve the commerce of the Mid-West, the Seaway must remain open as long as possible, because, when the Seaway is closed, shipments from Duluth, Milwaukee, Chicago and other Great Lakes ports must move to the Seaboard by rail at an added expense of about \$15.50 per ton, *infra*, page 12.

The operation of the Seaway is controlled by the Seaway Authority, with an office at Cornwall, Ontario. (J.A. 203a) The entrance to the Seaway is from the eastern end of Lake Ontario. After entering the Seaway, down-bound vessels pass through a series of locks, the first lock being known as Iroquois lock, and the last, which is near Montreal, being known as St. Lambert's. (J.A. 205a)

The water in Lake Ontario and in the vicinity of Iroquois lock is fresh and comparatively warm (J.A. 231a), but as it passes through the Seaway toward Montreal it becomes colder so that the water at St. Lambert's is the first to freeze (J.A. 205a); ultimately, that part of the Seaway becomes impassable even though freezing does not take place in Lake Ontario or at Iroquois. (J.A. 249a)

The chief witness for the appellees was Mr. Burnside, Director in charge of operations of the Seaway Authority, who testified that the Seaway was practically certain to remain open until November 30th. (J.A. 204a) In 1963 the Seaway remained open until December 13 (J.A. 60a), and the Seaway might have remained open even longer except for the fact that there were no more vessels to pass through. (J.A. 239a) Until 1964, no vessels had ever been compelled to spend the winter in the Great Lakes because of the closure of the Seaway. (J.A. 60a)

On November 25, 1964, the Seaway Authority decided to seek information as to the dates on which vessels would pass through the Seaway and telegraphed Hurum Shipping Co. in Montreal, among others, for this information. Hurum immediately replied by telegram asking the Sea-

way to ascertain the facts as to appellant's vessels from appellant's office in New York. (J.A. 47a)

Accordingly, on November 25, 1964, the Seaway Authority telegraphed appellant and appellant replied as shown in the Stipulation of Facts (J.A. 47a, 48a):

"17. On November 25, 1964, the Seaway Authority telegraphed Orient Mid-East [appellant] concerning the vessels' expected times of arrival at certain points, as follows:

IN THE BEST INTERESTS OF ALL CONCERNED WE RESPECTFULLY REQUEST ETA OF OCEAN VESSELS FOR SEAWAY TRANSIT RE APPROACHING CLOSING OF THE 1964 NAVIGATION SEASON 1 ETA UPBOUND ST. LAMBERT LOCK ONE 2 ETA DOWNBOUND PORT COLBORNE LOCK EIGHT 3 ETA DOWNBOUND IROQUOIS LOCK SEVEN.'

ETA upbound St. Lambert Lock means expected time of arrival upbound at St. Lambert Lock which is the lock nearest Montreal.

ETA downbound Port Colborne, Lock 8, means the expected time of arrival at the Lock at Port Colborne on the Welland Canal on the Lake Erie side of the Welland Canal.

ETA downbound Iroquois Lock, No. 7, means the expected time of arrival, downbound, at Iroquois Lock which is the first lock through which a vessel passes when leaving Lake Ontario through the Seaway to Montreal.

The same day, November 25, Orient Mid-East Lines telegraphed the following reply:

YOURS TODAY ETAs 1 NONE 2 OLAU GORM SEVENTH ORIENT MERCHANT SIXTH 3 OLAU GORM EIGHTH ORIENT MERCHANT SEVENTH *RESPECTFULLY*

*REQUEST IMMEDIATE ADVICES EVENT  
AUTHORITIES DECIDE CLOSE SEAWAY  
SOONER IN ORDER ATTEMPT ALTER AR-  
RANGEMENTS.'"* (Emphasis supplied)

Appellant's reply meant that none of its vessels would enter the Seaway up-bound; that the OLAU GORM was due at Port Colborne downbound on December 7 and the ORIENT MERCHANT was due at Port Colborne downbound on December 6; that the OLAU GORM and ORIENT MERCHANT were due at Iroquois downbound on December 8 and 7 respectively.

The Seaway never made any written reply to appellant's telegram. (J.A. 48a)

On November 25, the OLAU GORM was at Milwaukee, and she loaded there and at Chicago until November 29 when she sailed for Green Bay, Wisconsin. (J.A. 84a)

The ORIENT MERCHANT arrived at Milwaukee on the afternoon of November 26 (Thanksgiving Day.) (J.A. 74a) She loaded at Milwaukee and Chicago, working overtime so as to be able to hasten her departure.

Because the water at St. Lambert's was somewhat colder in 1964 than it had been in 1963, Mr. Burnside testified that he gave instructions to Mr. MacKenzie on December 1 (J.A. 235a) that he should telephone appellant that it "should begin to do something about getting to clear." (J.A. 216a) Mr. MacKenzie did not transmit this message to appellant. (J.A. 248a)

Events from December 1 through December 7, 1964:

Dec. 1—OLAU GORM sailed from Green Bay, Wisc. for Buffalo at 1755 hours. (J.A. 84a) ORIENT MERCHANT was at Chicago, loading. (J.A. 76a, 77a)

Captain Butt claims that he phoned Mr. Pen-dias and said to him that the weather was deteriorating and "he was strongly advised to

get his ships on the move to get out of the Seaway," but admitted that he knew of no written record of this call. (J.A. 255a, 258a) Mr. Pendas denied that this conversation took place. (J.A. 151a, 157a, 159a, 190a) The Seaway ultimately forwarded two records of a phone call, which cost \$2, from Mr. MacKenzie to Mr. Lyras (J.A. 316a, 317a) on December 1 but no call from Captain Butt. Appellant claims that Captain Butt was mistaken in saying that he had talked to Mr. Pendas, and that Mr. MacKenzie put in a call which was never consummated. See discussion, *infra*, p. 21-25.

Dec. 2—Mr. Pendas phoned the Seaway to inquire if the ships could safely be a day or two late and spoke to Mr. MacKenzie. (J.A. 145a, 164a) Mr. Pendas understood Mr. MacKenzie to say that the dates of December 7 and 8 given on November 25 were safe but that the ships shouldn't stay later. (J.A. 145a, 184a, 185a) Mr. MacKenzie testified that he told Mr. Pendas that if they were his ships he wouldn't want them further away than Port Colborne and down-bound. (J.A. 248a)

Dec. 3—ORIENT MERCHANT sailed from Milwaukee at about 6 p.m. at full speed for the Seaway. (J.A. 78a)

Dec. 4—OLAU GORM arrived Buffalo 0340 hours. (J.A. 85a) (Distance from Buffalo to Port Colborne, the entrance to the Welland Canal, 19 nautical miles.) Table of distances on Ex. B to be handed to Court on the argument.

The opinion below states, erroneously, that the OLAU GORM did not arrive at Buffalo until Dec. 5. (J.A. 341)

Dec. 5—At 2 p.m. Burnside decided to close Seaway at midnight and sent out broadcast to that effect. (J.A. 49a)

OLAU GORM sailed from Buffalo to Port Colborne (entrance to Welland Canal) at 2355 hours. (J.A. 85a)

Dec. 6—(Sunday) Last vessel to pass Iroquois down-bound (towards Montreal) was the MICHIGAN at 0048. (J.A. 48a) Mr. Pendias begged for permission for appellant's two ships to enter Seaway at Iroquois without success. (J.A. 147a)

Dec. 7—ORIENT MERCHANT arrived at Prescott (entrance to the Seaway) at 1347—OLAU GORM at 1310. (J.A. 80a, 86a)

When Captain Butt was on the stand, he was asked if he had any written record whatsoever, by way of memorandum or otherwise, to show that he telephoned Mr. Pendias on December 1. He said that he knew of no such record. (J.A. 257a, 258a) He also testified that he gave a similar warning to the agents of the VAN FU but that he gave no warning to the agents of the FLYING INDEPENDENT because he was assured by them that "everything was being done to get the FLYING INDEPENDENT out." (J.A. 258a) Both the VAN FU and the FLYING INDEPENDENT were too late to clear the Seaway and remained in the Lakes during the winter months. (J.A. 49a) The FLYING INDEPENDENT was at a port in Kenosha, Wisconsin, near Milwaukee, but did not sail therefrom until the day after the ORIENT MERCHANT had sailed. (J.A. 49a, 97a)

A warning of December 2 would have had no effect as regards the ORIENT MERCHANT because, even if the ORIENT MERCHANT had sailed from Milwaukee on December 2nd, she would not have arrived at Iroquois until after closure. (J.A. 78a, 80a)

The District Court's discussion of the testimony of Captain Butt's alleged call to Mr. Pendias on December 1 is completely misleading.



The opinion states (J.A. 340a) that Captain Butt testified that he telephoned Eagle Ocean Transport, appellant's agent in New York, on December 1 with a message to "get his ships on the move to get out of the Seaway." This is a half truth and the difference is material. Captain Butt's testimony was that he spoke *directly* to Mr. Pendias. (J.A. 255a)

Still more serious is the note to the opinion at J.A. 340a, which reads:—

"The fact that such a call [Butt to Pendias] did take place is corroborated by other evidence. A switchboard operator's work sheet and a telephone bill both show a call made from the Seaway Authority on December 1, 1964."

The switchboard operator's work sheet and the telephone bill both show that a call was made from the Seaway Authority on December 1 by *Mr. MacKenzie* to *Mr. Lyras*, an executive of Eagle Ocean Transport. (J.A. 316a, 317a) There is no record of any call made by Captain Butt on December 1 or on any other date.

How can Captain Butt's testimony that he made a call on December 1 to Mr. Pendias be corroborated by the Seaway's contemporaneous records that Mr. MacKenzie of the Seaway telephoned to Mr. Lyras of Eagle Ocean Transport?

If A testifies that he telephoned B on December 1, is A's testimony corroborated by written records that X telephoned Y? This is another instance of the opinion's inaccuracy and illogicality.

There are other factual errors in the opinion but as they are not of serious importance they are not listed.

When it became clear that the ORIENT MERCHANT and OLAU GORM would not be allowed to pass through the Seaway, it was decided that they should be berthed for the winter at Toronto on Lake Ontario to which port

they proceeded. (J.A. 81a, 86a) Meanwhile, C.A.R.E. and the other voluntary agencies who had made the shipments asked the appellant to keep their merchandise on board the two ships until navigation became open in April, 1965. (J.A. 89a) This was agreed to and a formal contract to which the United States was a party was signed (J.A. 90a), this agreement being summarized as follows (J.A. 51a):—

“CARE, Church World Service, Seventh Day Adventists and Lutheran World Relief, having requested Orient Mid-East to retain the cargo on board throughout the period the vessels would be locked into the Lakes, undertook to surrender the bills of lading originally issued and to pay the carrier the full freight due under the bills of lading first issued unless such freight had already been paid. Orient Mid-East, on its part, undertook to have new, second bills of lading issued, . . . . and agreed that the OLAU GORM and ORIENT MERCHANT would perform the voyages in accordance with the terms of the second bills of lading when the Seaway opened for navigation in the Spring of 1965. The parties also agreed that if they were unable later to agree upon the amounts, if any, due the carrier in addition to the freight already paid, any party could institute suit in a United States court of competent jurisdiction for resolution of that issue ‘all parties retaining all rights and defenses they presently have, and this agreement, issuance of the second bills of lading, and the payment provided for in article 1 above shall not be deemed to affect, waive or alter the rights or defenses of any party.’ They also agreed therein that ‘the failure of the Carrier physically to exercise any of its claimed rights, including the asserted right to discharge at Great Lakes ports or elsewhere, shall not be deemed to affect or diminish the amounts and/or rights of the Carrier to any further freight and/or remuneration to which the Carrier may be entitled under the contracts of carriage as evidenced by the second bills of lading and/or the bills of lading first issued.’”

In April 1965, when the ice conditions permitted, both ships left Toronto. (J.A. 55a)

The OLAU GORM proceeded to Buffalo where she loaded about 500 tons of cargo which had been left behind when she sailed from Buffalo on December 5. (J.A. 55a) The ORIENT MERCHANT also had not been able to load a full cargo; she was short about 3000 tons. (J.A. 55a) In order to fill her empty space, she sailed from Toronto to Duluth and other Great Lakes ports to load shipments furnished by defendants-appellees. (J.A. 55a) Unfortunately, on her return voyage, while attempting to pass through the Welland Canal, which connects Lake Erie with Lake Ontario, she stranded, seriously damaging her bottom. (J.A. 55a) With some difficulty she was brought through the Canal to a port of refuge (J.A. 105a), but her injuries were so serious and the time required for repairs was so long that it became necessary to terminate her voyage at Toronto to which port she had returned, and her cargo was transshipped on another vessel or vessels. (J.A. 58a, 106a)

The OLAU GORM delivered all of her cargo safely at destination. (J.A. 142a)

#### STATUTES INVOLVED:

None.

#### STATEMENT OF POINTS:

The District Court fell into error by overlooking or failing to consider the following:—

(1) Appellant knew that if its vessels were detained in the Great Lakes from December, 1964, until April, 1965, it would sustain a loss of approximately \$300,000. Appellant would do everything possible to avoid sustaining such a loss. (J.A. 148a, 180a, 181a)

Mr. Pendias, who was in charge of the routing of the vessels, was an experienced Lake operator and was fully aware that there was a possibility that the Seaway might close on short notice, but did not consider that by sailing the ORIENT MERCHANT from Milwaukee on December 3 and the OLAU FORM from Buffalo on December 5 any risk was being run.

1  
1  
It was to cargo's advantage that the ORIENT MERCHANT should continue loading as long as possible. When the ORIENT MERCHANT sailed, at 6 p.m. on December 3, for Iroquois, she had to leave behind 693 tons of cargo at Chicago and 1650 tons at Milwaukee, a total of 2343 tons. (J.A. 45a) The ORIENT MERCHANT's loading rate was 1000 tons per day. (J.A. 187a)

If the ORIENT MERCHANT had sailed two days earlier, on December 1 (which she would have had to do to reach Iroquois by December 5), she would have left behind a total of 4343 tons of cargo.

The cost of railing the 2343 tons of cargo left behind to seaboard was \$36,174.38, equal to \$15.44 per ton. (J.A. 324a)

If the ORIENT MERCHANT had sailed on December 1 and left 4343 tons behind the cost of railing to seaboard that larger number of tons would have been \$67,055.92. The appellant had taken out insurance to cover railing cost in the amount of \$55,000 (J.A. 274a) which would have been sufficient to rail 3562 tons of cargo to seaboard. Consequently, 781 tons would, unless left at the loading ports, have to be railed to seaboard at the expense to the cargo of \$12,058.64.

(2) The District Court overlooked the fact that the appellant had taken out insurance to cover the cost of railing cargo from the loading ports to seaboard in the event that its ships had to sail before a full cargo was loaded. This insurance was in the amount of \$55,000 with respect to the ORIENT MERCHANT and \$58,000

with respect to the OLAU GORM. These policies were in the same terms. The ORIENT MERCHANT policy read: —(J.A. 274a, 279a)

"This insurance is to indemnify the Assured up to \$55,000 for the actual costs and expenses voluntarily incurred by the assured for reforwarding such cargoes which they are unable to load at Great Lakes ports by reason of the vessel being delayed and thereby being forced to discontinue loading operations within the Great Lakes by reason of the announced closing date of the St. Lawrence Seaway."

Appellant, therefore, gained no advantage by risking detention for the winter months because it could have railed cargo left behind to Seaboard at the expense of the insurance companies as actually happened with respect to the cargo of the ORIENT MERCHANT left behind at Chicago and Milwaukee. (J.A. 45a, 180a)

(3) The District Court refused to consider as relevant the fact that when the American-flag ship, FLYING INDEPENDENT, was locked in the Great Lakes, from December to April, the United States continued to pay subsidies to the owners on the ground that the owners of the FLYING INDEPENDENT were not at fault for the detention. (J.A. 53a, 54a, 191a)

The ORIENT MERCHANT and OLAU GORM were under foreign flags, and the FLYING INDEPENDENT was American owned.

The owners of the FLYING INDEPENDENT allegedly received the same "warnings" as did the appellant; nevertheless, the United States, defendant-appellee in the case at bar, held the owners of the FLYING INDEPENDENT blameless, but now argues that appellant, owning and operating ships under the Greek and Danish flags, was negligent in failing to sail its ships to the Seaway earlier than it did.

The above is a clear case of improper flag discrimination. If the owners of the **FLYING INDEPENDENT** were blameless then appellant equally was without fault.

(4) In one part of its opinion, the Court stated that weather conditions were unpredictable (J.A. Note 338a), and in another part said that cold weather had been forecast and referred to the fact that the Seaway Authority had notified an organization of shipowners in Montreal that the water at St. Lambert's lock was colder than it had been in 1963. (J.A. 336a) The Court disregarded the fact that there was no evidence that these so-called "warnings" ever became known to appellant, and the Court also disregarded the fact that in 1963 the Seaway remained open until December 13 (J.A. 60a), whereas, in the present instance, appellant's ships arrived at Iroquois lock on December 7 six days before the 1963 closing and were not allowed to enter.

(5) The Court overlooked the testimony of Mr. Burnside that although low temperatures may prevail for a few days, a sudden thaw will entirely change the situation, and the Seaway will remain open. (J.A. 208a)

(6) In its telegram of November 25, in which appellant notified the Seaway that its vessels would arrive at Iroquois on December 7 and 8, appellant further asked the Seaway to notify appellant if these dates were too late. (J.A. 88a) Admittedly, the Seaway never replied in writing to this reasonable request. (J.A. 48a)

The District Court held that it had no duty so to do. (J.A. 346a) However, it is well settled that although no legal duty may exist, such a duty may be assumed. In *Melodee Lane Lingerie Co. v. American District Telegraph Company et al.*, 218 Northeastern Rep. 2d 661, 18 N.Y. 2d 57, at page 64, the Court of Appeals said:—

"It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

(*Glanzer v. Shepard*, 233 N.Y. 236, 239, quoted in *Marks v. Nambil Realty Co.*, 245 N.Y. 256, 258)."

Mr. Burnside testified that the Seaway kept a record of the position of the ships in the Lakes, and sent out warnings as the situation required. (J.A. 215a) Unfortunately, the Seaway's performance was inefficient.

In the present instance, there is disputed testimony (see *infra* p. 21-25) that on December 1, 1964, Captain Butt of the Seaway gave by telephone something in the nature of a warning to Mr. Pendias, and there is also testimony that on December 2, Mr. MacKenzie on being asked by telephone if the previously given dates of December 7 and 8 were safe, said: "If these ships were mine, I would not want them farther away than Port Colborne and on their way down bound. . . ." (J.A. 248a)

Neither of these alleged statements were confirmed in writing as due care required. Statements made only over the telephone may easily be misunderstood.

(7) The District Court disregarded the fact that even if Mr. MacKenzie did state to Mr. Pendias on December 2 that if they were his ships, he would want them on the way to Iroquois via Port Colborne, a warning on December 2 was too late to enable the appellant to sail the ORIENT MERCHANT in time to reach Iroquois by midnight on December 5, because the sailing time was almost four days. (J.A. 48a)

(8) At J.A. 341a (footnote) the learned trial judge sarcastically comments that when Mr. Pendias in his telegram to the Seaway of November 25 asked immediate advice of the date of closure "he did not specify that he would need four days advance notice."

In fact, only about 1½ days' advance notice was required for the OLAU GORM which had arrived at Buffalo at 0340 hours on December 4. (J.A. 85a)



Appellant's telegram of November 25 showed that the two vessels would be west of the Welland Canal on December 5 by stating that they would arrive at Port Colborne on December 6 and 7, respectively, *supra* p. 6.

The Seaway kept a record of the position of the ships (J.A. 215a) which would clearly show that the ORIENT MERCHANT needed four days' advance notice of closure. The Seaway's broadcast, sent out at 2 p.m. on December 5, gave *only 10 hours* notice of closing and was worthless as to vessels not in Lake Ontario. (J.A. 49a, 229a, 230a)

Buffalo is only 19 miles from Port Colborne. See table of distances in Ex. B to be handed to Court on the argument, and from Port Colborne to Iroquois is a day's steaming. (J.A. 48a) If the Seaway had sent out the notice of closure on December 4, instead of on December 5, the OLAU GORM would have reached Iroquois in time.

#### SUMMARY OF ARGUMENT

At J.A. 343a, the opinion below states that the bills of lading included accepted "exculpatory provisions" which "would appear to offer absolute protection to the carrier under the circumstances of this case, i.e., a lock-in by reason of ice." And the Court at J.A. 345a quoted from the opinion of the Circuit Court of Appeals for the Ninth Circuit in *De La Rama S.S. Co. v. Ellis*, 149 F. 2d 61, at page 64, as follows:—

"What the shipper had the right to demand of the carrier was, not infallibility, but the exercise of a reasoned judgment of the situation as it appeared at the moment, having regard to the rights of all concerned."

The District Court then concluded that the appellant had not exercised a "reasoned judgment" and dismissed the claim for freight from Toronto to destination.

The Judge's conclusion that appellant had not exercised reasoned judgment is fully reviewable on appeal.



*Mamiye Bros. v. Barber S.S. Lines*, 360 F. 2d 774, C.A. 2.

*Esso Standard S/A v. Gasbras Sul*, 387 F. 2d 573, C.A. 2, cert. denied May 20, 1968.

*Nolan v. Sullivan*, 372 F. 2d 776, C.A. 3.

*Fulton National Bank v. Tate*, 363 F. 2d 562, C.A. 5.

Appellant denies that there was any lack of reasoned judgment on its part. It points to the fact that its two ships arrived at Iroquois on December 7th, the ORIENT MERCHANT as scheduled in appellant's telegram and the OLAU GORM one day earlier (J.A. 88a), ~~approximately a week before the Seaway closed in the preceding year.~~ It also points to the fact that not only appellant's ships but also the VAN FU and the American-flag ship FLYING INDEPENDENT were also too late to pass Iroquois and spent the winter in the Great Lakes. (J.A. 49a)

It was to the advantage of shippers that the ORIENT MERCHANT continue loading as long as possible; otherwise substantial quantities of cargo might have to be railed to seaboard at cargo's expense, *supra*, p. 12.

Appellant denies that Captain Butt ever gave any so-called "warning" on December 1 to Mr. Pendias as will be shown *infra*, page 21-25. If he did why should Mr. Pendias have telephoned the Seaway on December 2 to inquire if it would be safe for his two vessels to arrive at Iroquois a day or two later than specified in appellant's telegram of November 25. (J.A. 145a)

Mr. MacKenzie told Mr. Pendias in this telephone conversation that his vessels should not be later than the dates specified and added, according to his own version, that if they were his vessels he would want them on the way to Port Colborne bound for Iroquois, *supra*, page 7. (J.A. 248a) If Mr. MacKenzie actually expressed this personal opinion, it was too late to enable the ORIENT MERCHANT to pass through Iroquois because the

ORIENT MERCHANT sailed from Milwaukee on December 3rd and did not reach Iroquois until the afternoon of the 7th. If the ORIENT MERCHANT had sailed on the 2nd she would not have reached Iroquois until the afternoon of the 6th. Therefore, appellant should have been entitled to the second freights of the ORIENT MERCHANT, amounting to \$194,562.46, if not the second freights of the OLAU GORM, amounting to \$188,291.84. (J.A. 52a, 55a)

In support of the above argument, appellant relies upon the fact that the United States, through the Maritime Administration, continued to make subsidy payments to the owners of the FLYING INDEPENDENT although her owners were not entitled to subsidy payments if the ship were inactive due to the neglect of her owners. (J.A. 95a, 96a)

The learned trial Judge brushed this decision of the Maritime Administration aside as having no bearing. (J.A. 191a)

### ARGUMENT

In his opinion dated July 31, 1967, the District Judge made the following ruling: (J.A. 343a)

"The bills of lading here in dispute include accepted exculpatory provisions (*supra*) and on their face such provisions would appear to offer absolute protection to the carrier under the circumstances of this case, i.e., a lock-in by reason of ice."

The following authorities support the District Judge:

*De La Rama S.S. Co., Inc. v. Ellis*, 149 F. 2d 61 (9th Cir.), *cert. denied*, 326 U.S. 718 (1945); *Hirsch Lumber Co. v. Weyerhaeuser S.S. Co.*, 233 F. 2d 791 (2nd Cir.), *cert. denied*, 352 U.S. 880 (1956); *International Packers v. Federal Maritime Commission*, 123 U.S. App. D.C. 55, 356 F. 2d 808 (D.C. Cir. 1966); *Kroll v. Silver Line*, 116

F. Supp. 443 (N.D. Calif. 1953); *The Wildwood*, 133 F. 2d 765 (9th Cir.), *cert. denied*, 319 U.S. 771 (1943); *Colonialgrossistforening v. Moore-McCormack*, 83 F. Supp. 464, *aff'd* 178 F. 2d 288 (2d Cir. 1949).

The English decisions are to the same effect: *G. & H. Renton Co., Ltd. v. Palmyra Trading Corp.*, L.R. 1957 Appeal Cases 149; *Associated Lead Manufacturers v. Ellerman & Bucknall S.S. Co.* [1956] 2 Lloyd's List Law Reports 167.

(The facts in the above decisions are summarized, *infra*, p. 29)

- I. The Seaway Authority undertook the duty of notifying shipowners whose vessels were in the Lakes of the probable closing date, but this duty was not efficiently performed.

Beginning about November 23, 1964 (J.A. 207a), Mr. Burnside, Director of Operations of the Seaway, testified that telegrams were sent to the Canadian Shipping Federation in Montreal three times a week (J.A. 207a) comparing the water temperature at St. Lambert's lock in 1963, when the Seaway remained open until December 13, with the 1964 temperature.

St. Lambert's lock is the lock nearest to Montreal, and the water in that lock is the first to freeze.

The water level in Lake Ontario is 246 feet above sea-level so that the Ontario water runs continuously down to Montreal which is at sea-level. The Ontario water is comparatively warm, navigation remaining open at least until late December. (J.A. 230a, 231a) However, in passing from Iroquois lock, nearest to Lake Ontario, to Montreal the water cools off so that St. Lambert's is the first to freeze.

No telegrams were sent to anyone in the U.S.A. There is no evidence that they reached the appellant or even Hu-

rum Shipping Co., appellant's agent in Montreal. (J.A. 46a)

The opinion below quotes some telegrams sent to the Canadian Shipping Federation as follows: (J.A. 339a)

Date Of Advice	Water Temperatures		No. Of Ocean Ships Above St. Lambert
	1963	1964	
November 30	40.0 F°	34.5 F°	83
December 2	36.0 F°	32.0 F°	67
December 4	34.0 F°	32.0 F°	39

Any information sent as late as December 2 was useless as regards the ORIENT MERCHANT as the ORIENT MERCHANT could not have reached Iroquois by December 5 unless she sailed from her loading port on December 1, *supra*, page 18.

The telegram of December 4 was useless as to both ships.

Mr. Burnside did not actually decide to close the Seaway until 2 p.m. on December 5, when notice of closure was sent out, *supra*, page 7.

Even if appellant had received them, they would have conveyed no worth while information. All that they showed was that the water in December, 1964, was colder than in December, 1963, when the Seaway remained open until the 13th. They might be taken to show that the Seaway would be closed 4 or 5 days earlier than 1963, but they did not forecast a closing on December 5.

Mr. Burnside himself pointed out the unreliability of the information in these telegrams, testifying that if warm days came on the water would warm and the Seaway remain open later than anticipated. (J.A. 208a, 209a).

Mr. Burnside further testified that about December 1, 1964, he concluded that the Seaway might be closed earlier than December 13, when it had closed in 1963 (J.A. 235a), and that notice should be given that shipowners should begin to be thinking of getting their vessels out.

He testified that he specifically instructed Mr. MacKenzie to telephone appellant to that effect (J.A. 235a) but Mr. MacKenzie denied that he gave any such notice to appellant. (J.A. 248a)

It was not until noon on December 5 that Mr. Burnside reached the conclusion that the Seaway must be closed at midnight on that day. (J.A. 213a) Notice of closing was delayed until 2 p.m. so that only 10 hours' notice of closing was given. (J.A. 49a)

This was no notice at all as regards ships in Lake Erie, Lake Huron or Lake Superior. Ships in such important ports as Milwaukee, Chicago, Detroit, Toledo, Cleveland or Buffalo could not possibly reach the Seaway in 10 hours. (J.A. 230a)

II. Mr. Pendias was not notified by Captain Butt on December 1, 1964, that Orient Mid-East's ships should immediately commence their voyages to Iroquois Lock.

Captain Butt testified that on December 1 he telephoned from Cornwall, Ontario to the office of the appellant in New York and spoke to someone who identified himself as Mr. Pendias.

Captain Butt testified to a conversation in which not only appellant's situation but also that of the FLYING INDEPENDENT was discussed. (J.A. 255a, 256a) Captain Butt said that in this conversation he "strongly advised [his listener] to get his ships on the move to get out of the Seaway," *supra* page 7. (J.A. 255a) Mr. Pendias denied that this conversation took place, *supra* page 7. (J.A. 151a, 157a, 159a, 190a)

There was no written confirmation of this alleged conversation, and the writings ultimately produced by Mr. Burnside showed that no such conversation took place.

Captain Butt was asked on cross-examination if there was anything in the records of the Seaway to indicate

that he had telephoned Mr. Pendias on December 1, 1964, and he said he knew of nothing. (J.A. 257a-258a)

Near the conclusion of the trial Mr. Burnside was asked by Judge Corcoran if the Seaway had any written record of Capt. Butt's call on December 1. (J.A. 260a) Mr. Burnside said, in some embarrassment, that there was no record of a call by Capt. Butt on December 1 but that there was a record of a call on that date by Mr. MacKenzie to Mr. Lyras, an executive of the appellant. (J.A. 260a) Mr. Burnside's embarrassment was due to the fact that he had previously testified that he had no records to show the names of persons making or receiving calls. (J.A. 237a) Mr. Burnside produced nothing in writing until after the trial had been concluded, and he had returned to Cornwall. (J.A. 314a)

Mr. MacKenzie, who was called as a witness on behalf of the United States, denied that he transmitted a warning to the appellant on December 1. (J.A. 248a)

From Cornwall Mr. Burnside forwarded a letter containing the Seaway's written records indicating that Mr. MacKenzie had telephoned Mr. Lyras (an executive of appellant) on December 1. (J.A. 314a, 315a, 316a, 317a) He also forwarded what purported to be a bill from the telephone company as of that date showing a charge of \$2.00 for a call by Mr. MacKenzie to appellant's New York number. (J.A. 317a) The \$2.00 charge indicates that the telephone call must have been brief.

The appellant has two executives named "Lyras," one of whom was present at the trial. (J.A. 237a) Counsel for appellees made no attempt to call either of them to show the receipt of a warning.

Additional doubt is thrown on Captain Butt's testimony by his lack of frankness in answering questions on cross-examination.

He was asked (J.A. 257a) if he knew of any written records in the custody of the Seaway which would confirm

his alleged telephone conversation of December 1 and he said he did not know of any records kept by the Seaway. (J.A. 257a, 259a) Captain Butt, Mr. Burnside and Mr. MacKenzie, all being executives of the Seaway, had come to Washington to testify as witnesses for the appellees. It is incredible that Captain Butt did not know that neither of the Seaway's written records showed that he had telephoned Mr Pendias on December 1, but only a call from Mr. MacKenzie to Mr. Lyras. Evidently Captain Butt wished to conceal these records because of their inconsistency with his testimony.

No explanation to show that these written records were incorrect was ever offered by the appellees.

~~Aside from the written evidence,~~ it is completely inconceivable that Mr. Pendias would not have immediately sailed the ORIENT MERCHANT and OLAU GORM for Iroquois had he received a definite warning from Captain Butt. If the ORIENT MERCHANT and OLAU GORM were detained in the Seaway from December, 1964 to April 1965 (as was the case), appellant stood to lose about \$300,000 on account of hire paid to the owners of the OLAU GORM and loss of use of the ORIENT MERCHANT, *supra* page 11. On the other hand, if the ships had sailed on December 1 for Iroquois appellant had in effect insurance in the amount of \$55,000 with respect to the ORIENT MERCHANT and \$58,000 with respect to the OLAU GORM, *supra* page 12, 13, which would be used to rail cargo left behind at Milwaukee and Buffalo to Montreal or other Seaboard port where it could be loaded on appellant's vessels. (*Supra* page 13, J.A. 180a, 324a)

Because of its insurance, appellant stood to lose little or nothing by starting its vessels for Iroquois on December 1 or 2, whereas enormous loss would be sustained if they had to winter in the Great Lakes.

Further doubt is thrown on Captain Butt's testimony as to a telephone warning on December 1 by the fact that

*ind. 111*



on the very next day Mr. Pendias telephoned the Seaway to ask if it would be safe for the vessels to remain in the Lakes a day or two longer than the dates given in appellant's telegram to the Seaway of November 25, *supra* page 7. (J.A. 145a)

Mr. Pendias was kept informed by his Port Captain that the FLYING INDEPENDENT, which was loading at Kenosha, near Milwaukee, was not getting ready to sail, and he thought that the ORIENT MERCHANT could safely remain as long as the FLYING INDEPENDENT. (J.A. 156a)

When, on December 2nd, Mr. Pendias talked to Mr. MacKenzie over the telephone, he was told by Mr. MacKenzie that the vessels should arrive at Iroquois by December 7 and 8 (J.A. 145a), the dates mentioned in appellant's telegram of November 25, *supra* page 5. Mr. MacKenzie testified that in the course of this conversation he said to Mr. Pendias that if they were "my" vessels he would want them on the way to Port Colborne and Iroquois, *supra* page 7. (J.A. 248a)

In fact, the ORIENT MERCHANT left Milwaukee for Port Colborne and Iroquois on the next day, December 3rd, and the OLAU GORM was at that time on her way to Buffalo, only 19 miles from Port Colborne, *supra* page 6, 7.

The explanation of this \$2.00 telephone call from Mr. MacKenzie to Mr. Lyras is not difficult.

Mr. MacKenzie was told by Mr. Burnside on December 1st (J.A. 235a) to telephone the appellant in New York and pass on the word that it was about time to start thinking about leaving the Great Lakes. (J.A. 216a) Mr. MacKenzie accordingly put in a call to Mr. "Lyras." There are two executives named "Lyras" in appellant's office. (J.A. 237a) This call was not completed, probably because the person called was not available, and, in



*not binding*

the press of others matters, Mr. MacKenzie forgot to renew it.

Both Seaway records show that the call was put in by Mr. MacKenzie (J.A. 316a, 317a), and it is inconceivable that this call could have been made by Captain Butt who testified to a lengthy conversation with Mr. Pendias. (J.A. 255a, 256a, 258a) Cornwall is about 400 miles from New York and such a lengthy conversation as was testified to by Captain Butt would have cost much more than \$2.00.

III. The District Court should have been guided by the decision of the U.S. Maritime Administration in the case of the FLYING INDEPENDENT that the detention in the Great Lakes of appellant's two vessels was attributable "to conditions beyond the control of the operator" and not to lack of the "most efficient and economical operation of the vessels."

The facts regarding the FLYING INDEPENDENT have been stipulated (J.A. 95a to 97a), the stipulation reading:—

"30. In a memorandum dated March 9, 1965 from Mr. Edward Aptaker, Chief, Office of Government Aid, Maritime Administration, Washington, D.C., to the Secretary, Maritime Subsidy Board, subject 'American Export-Isbrandtsen Lines, Inc.—Layup of the SS FLYING INDEPENDENT In Excess of 30 Days,' Mr. Aptaker reported that the SS FLYING INDEPENDENT was not permitted to proceed through the Iroquois Lock on December 7, 1964 and that the ship returned to Toledo, Ohio, discharged all cargo, and prepared for winter layup. Mr. Aptaker concluded: 'A review of the operations of the SS FLYING INDEPENDENT indicates that the layup can be attributed to conditions beyond the control of the operator.' He recommended, therefore, that the vessel be retained in subsidized status. His recommendation was approved by the Maritime Subsidy Board on March 24, 1965, signed by James S. Dawson, Jr. \* \* \*

The pertinent provision of the Maritime Administration's General Order No. 27 reads as follows:

*Right of Administrator to Recover Subsidy for any Period of Idleness.* The Administrator may, prior to payment of subsidy for any voucher period which includes a period of idleness, require the operator to establish to the satisfaction of the Administrator that such period of idleness could not have been prevented in whole or in part through the most efficient and economical operation. The Administrator may recover any payment of subsidy for any item of expense allocable to such period of idleness which in the opinion of the Administrator could have been avoided by efficient and economical operation. 46 C.F.R. 281.5."

Mr. Aptaker's recommendation that the FLYING INDEPENDENT be retained in subsidized status during the layup period is approved by the Maritime Subsidy Board, Maritime Administration, by Order dated March 24, 1965. (J.A. 53a, 95a to 97a)

The itinerary of the FLYING INDEPENDENT, which is closely parallel to the itinerary of the ORIENT MERCHANT, is a part of the record. (J.A. 97a) It shows that the FLYING INDEPENDENT arrived at Montreal, inbound, on November 17. She then called at Toronto, Toledo and Detroit, arriving at Chicago on November 30. She left Chicago for Kenosha on December 1 and arrived at Kenosha, which is midway between Chicago and Milwaukee, on December 2. She did not leave Kenosha until the morning of December 4, about 12 hours later than the time when the ORIENT MERCHANT sailed from Milwaukee.

She arrived at Ogdensburg, New York, close to the entrance to the Seaway, on December 7 at 1835 hours, having suffered no delays en route. (J.A. 97a) After notification that the Seaway was closed, the FLYING IN-

DEPENDENT returned to Toledo where her cargo was discharged. (J.A. 97a)

In *Sears, Roebuck & Co. and Allstate Insurance Company v. All States Life Insurance Company*, 246 F. 2d 161, the Allstate Insurance Company brought suit against the All States Life Insurance Company for trade-mark infringement and alleged unfair competition. The basis of the suit was that the plaintiff Allstate Insurance Company had an exclusive right to use the name "Allstate" which was infringed by the defendant, All States Life Insurance Company. The plaintiff was engaged in the sale of policies of automobile and general casualty insurance, whereas the defendant's business was that of life insurance.

The Board of Insurance Commissioners of Texas had approved the use of the defendant's name. Speaking of this, the Court said, page 169:

"Assuming that appellants are correct in their contention that no finality or conclusiveness attaches to the Board's action in approving the name, it must be conceded that in the case of an official state administrative body whose duty it is to regulate an industry the findings and decisions of such a body in the field of its responsibilities is persuasive and certainly relevant in the determination of the same fact by a trial court. Moreover, it cannot be seriously contended that the insurance board did not have the duty to pass on this precise matter."

Other decisions to the same general effect are *Standard Accident & Insurance Co. v. Standard Surety & Casualty Co.*, 53 F. 2d 119; *Sonken-Galamba Corporation v. Guy A. Thompson*, 225 F. 2d 608.

In the case at bar, the Trial Judge said that he would give no consideration at all to the fact that the Maritime Administration had found the owners of the FLYING INDEPENDANT in nowise at fault because she did

not reach Iroquois prior to midnight on December 5. (J.A. 191a)

The owners of the FLYING INDEPENDANT were aware of the impending closure of the Seaway. Captain Butt testified (J.A. 258a) that their agents had told him that everything was being done to get the FLYING INDEPENDANT out. (J.A. 258a) Notwithstanding, the FLYING INDEPENDANT did not sail from Kenosha until the morning of December 4, approximately 12 hours after the ORIENT MERCHANT had left Milwaukee. It is also more than a coincidence that Captain Butt testified that he also gave a warning to the agents of the VAN FU (J.A. 258a, 259a) which also did not reach Iroquois in time to leave the Lakes. (J.A. 49a)

IV. Under the provisions of the bills of lading the appellant is entitled to freight in the amount of \$382,854.30 (J.A. 52a) and is also entitled to storage charges in an undetermined amount. The decree of the District Court should be reversed insofar as it denies appellant's claim for freight and storage charges with directions to enter a decree in favor of the appellant for these items when the exact amount has been ascertained.

It has been stipulated (J.A. 52a) that if the appellant is entitled to additional freight the total amount due is \$382,854.30. It is further stipulated that if the Court should decide that there should be deducted from this additional freight certain items in the freight which were included in the first freight and had not been incurred, then the total amount deducted should be \$102,747.14. (J.A. 52a) These items which were subject to deduction were St. Lawrence Seaway tolls, agency fees at loading and discharging ports, stevedoring costs for loading and discharging, port expenses at loading and discharge ports, and Panama Canal tolls. (J.A. 52a)

At page 18, 19, *supra*, appellant's brief cites eight cases which sustain appellant's right to additional freight. In

four of the cases cited, namely, *Hirsch Lumber Co. v. Weyerhaeuser S.S. Co.*; *Kroll v. Silver Line*; *G. & H. Renton Co., Ltd. v. Palmyra Trading Corp.*, and *Associated Lead Manufacturers v. Ellerman & Bucknall S.S. Co.*, a strike at the port of discharge was held to justify the carrier in terminating the voyage at a way port and retaining the freight paid in advance. The shippers were obliged to forward the goods at their own expense to the port of discharge.

*International Packers v. Federal Maritime Commission*, *supra*, page 18, also involved a strike which prevented the discharge, and this Court held that the shipowners were entitled to additional payments to compensate them for the delay.

In *De La Rama S.S. Co., Inc. v. Ellis*, *supra*, page 16, 18, the ship was engaged in loading for the Philippines in December, 1941, and continued to load even after the attack on Pearl Harbor. The Court held that the shipowner was not required to stop the loading immediately and was entitled to freight on the cargo loaded even although the voyage later had to be abandoned and the cargo discharged.

In *The Wildwood*, *supra*, page 19, the ship was on a voyage for Vladivostok the cargo consisting of products which were contraband of war. From radio broadcasts the shipowners became convinced that their vessel was likely to be captured by a British cruiser and they accordingly diverted her to a U.S. West Coast port where the voyage was terminated and the cargo discharged. Although there was no proof of real danger of capture, the Court held that they were entitled to terminate the voyage and retain the freight, leaving the shippers of the cargo to forward it to Vladivostok at their expense.

In *Colonialgrossistforening v. Moore-McCormack*, *supra*, page 19, the ship was on a voyage from the U.S.A. to Trondheim, Norway in 1940. When the ship arrived at

Trondheim the German occupation had taken place. After some delay, the ship brought the cargo back to New York where it was not wanted by the shippers. The shipowners were held entitled not only to retain the original freight but also to an additional freight for carrying the cargo from Trondheim to New York.

In the case at bar the Trial Judge found that the appellant had sufficient warnings of the impending closure of the Seaway and should have sailed its vessels in time to reach Iroquois before the closure.

This would have required the ORIENT MERCHANT to leave Chicago, where she then was, on December 1 (J.A. 77a) as it would have taken almost four days to reach Iroquois from Chicago. (The ORIENT MERCHANT left Milwaukee on December 3rd at 1800 hours and did not reach Prescott, near Iroquois, until December 7 at 1347 hours.) (J.A. 78a, 80a)

There are no specific findings as to what warnings appellant received.

It is undisputed that Mr. Pendias initiated a telephone conversation with Mr. MacKenzie on December 2nd as Mr. Pendias wanted to know if his ships could delay their arrival at Iroquois for a day or two longer than the date fixed in Mr. Pendias' telegram of November 25. (J.A. 145a) Mr. Pendias understood Mr. MacKenzie to say that the dates of December 7 and 8 fixed in the above-mentioned telegram were safe. (J.A. 145a) Mr. MacKenzie said that he told Mr. Pendias: "If these ships were mine, I would not want them farther away than Port Colborne and on their way downbound." (J.A. 248a) This warning, if it was a warning, was too late for the ORIENT MERCHANT because if she had sailed on December 2, she would not have arrived at Iroquois until after Iroquois had closed.

On the basis of hindsight, appellant should have sailed the ORIENT MERCHANT from Chicago on December 1

even though this would have resulted in shutting out thousands of tons of cargo.

There was, however, no reason why the ORIENT MERCHANT should have sailed on that date. The alleged telephone call of Butt clearly never took place, *supra*, page 21-25. No official written warning of impending closure was issued by the Seaway and the decision to close Iroquois was not reached until four days later. (J.A. 213a) If the ORIENT MERCHANT had sailed from Chicago on December 1 and arrived at Iroquois on December 5, she might have been a week too early, and appellant would have been criticized for sailing abruptly with only half a cargo on board.

Buffalo, the loading port of the OLAU GORM, is only 19 miles from Port Colborne and it is about one day's sail from Port Colborne to Iroquois. (J.A. 48a)

If Mr. Burnside had reached the conclusion on December 4 that Iroquois must be closed by midnight of the 5th and had sent out a notice to that effect, the OLAU GORM could have reached Iroquois before closure. By delaying until the 5th and giving only ten hours' closure notice, Mr. Burnside made it impossible for any vessels not already in Lake Ontario to reach Iroquois in time.

In the events that happened, it is easy for a trial judge to criticize appellant's handling of its vessels, but, as stated in *Olsen v. Luckenbach*, 238 Fed. 237, at page 240:

"\* \* \* a standard of prudent conduct, set up after the event by one who was not present, must be regarded with the greatest caution as a criterion of legal obligation. \* \* \*"

The District Court attempts to support its decision by citing cases where the facts are essentially different.

In *Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero*, 213 F. Supp. 97, affirmed 324 F. 2d 955, C.A. 2, 2500 tons of steel plates had been shipped at New York



to be carried to Vizagapatam (called for convenience "Vizag"). The HELLENIC HERO discharged the steel plates at Madras instead of at Vizag and suit was brought to recover the expense of carriage from Madras to Vizag.

In July and August, 1957, when this shipment was made, it was well known to the shipowner that the vessels discharging at Vizag were experiencing serious delay, due to congestion and unavailability of berths. The HELLENIC HERO arrived at Vizag in September of 1957, and, in accordance with expectations, found that the port was heavily congested and all berths occupied.

The HELLENIC HERO remained at Vizag from September 26 to October 5, it being impossible to discharge in a berth or in lighters. On October 5, after having been notified that the HELLENIC HERO could not be berthed until October 20th, the shipowners instructed the ship to proceed to Madras. No notice of this deviation was given to the consignees until October 5 and there was evidence that, if they had been notified, they could have arranged a speedy discharge. Madras is 500 miles from Vizag, and the shipowners left the steel plates there, refusing all further responsibility.

In this case, the shipowners knew for a certainty that delay would be experienced in effecting discharge at Vizag.

Obviously, a shipowner cannot accept cargo for a congested port and, on finding that the congestion is in effect on the ship's arrival, discharge the cargo at a port 500 miles distant.

In the case at bar the shippers and appellant both knew that the Seaway would close in December, but neither knew, or could know, the exact date of closure. The shippers never suggested that the ORIENT MERCHANT should sail on December 1 nor did they stop the loading of their cargo. It was to shippers advantage that loading



should not be abruptly terminated. Both parties expected the ships to pass Iroquois safely. There was, at most, an error of judgment in which both participated.

In *Merchants Corporation of America v. Nine Thousand Six Hundred Fifty-Five Long Tons, more or less, of No. 2 Yellow Milo*, 238 F. Supp. 572, also cited below, J.A. 346a, the vessel arrived at her loading port on April 11, and commenced loading cargo. On April 12 a United States Marshal seized the vessel and liens were placed upon the vessel by others. The ship was "financially unseaworthy" when loading commenced, and the voyage had to be abandoned and the cargo discharged. As the ship was not in a position to perform the voyage at the very moment when the loading commenced, the Court held that the freight had not been earned and could not be collected. In the present instance, it is admitted that the appellant earned freight under the bills of lading first issued and this question is now *res judicata*.

In the case at bar three of the appellees had obtained bills of lading marked "freight prepaid" in return for which they signed "due bills" by which they promised either to pay the freight within five days or be responsible for interest plus the expense of collection. They delayed paying the freight for more than three months and the District Court held them liable for this default in the amount of \$13,543.90. (J.A. 354a)

No appeal has been taken from the decision below holding that appellees were legally bound to pay the freight, and the rule of *res judicata* applies.

The decision that the appellees were bound to pay the first freights completely distinguishes the case at bar from the *Merchants Corporation of America* case cited by the lower court.

It often becomes necessary to reach a decision between alternatives, and, if that decision turns out unfortunately,

the party making it is blamed for the loss. If, however, he has acted as a "reasonable man" in making his decision, he is not held at fault.

In *Esso Standard Oil S.A. v. S.S. Gasbras Sul*, 387 F. 2d 573, C.A. 2, certiorari denied May 20, 1968, a tank steamer had been discharging cargo at the Esso Standard Terminal at a port in Guatemala. On September 16, at 2130 hours, the discharge was completed. The weather was bad and the visibility poor.

If the ship remained at her moorings there was danger of being struck by a Chubasco, a local, heavy squall. Nevertheless, the Master decided it was less dangerous to remain than to attempt to leave. Early the next morning the wind became much worse and the anchors began to drag. The Master immediately ordered the stern lines to be cut and the anchors to be taken in. After great difficulties, the vessel was able to put out to sea.

It was later discovered that through dragging of the vessel's anchors damage, amounting to over \$60,000, had been caused to Esso's submarine pipe line.

In the lower court, the shipowners were held liable for the damage to the pipe line on the ground that the ship should not have remained at her moorings in view of the impending storm. This decision was reversed by the Court of Appeals. At page 580, the Court said that the Master was entitled to exercise his reasonable discretion under the circumstances of the case and that his decision

"\* \* \* does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong. *The Mohegan*, 28 F. 2d 795, 796 (2 Cir. 1928); *Farrell Lines, Inc. v. The s/s Birkenstein*, 207 F. Supp. 500, 509 (S.D.N.Y. 1962); *Olsen v. Luckenbach*, 238 F. 237, 240 (S.D.N.Y. 1919)."

We submit that the appellant was not negligent; that, at the most, there was an error of judgment, which is

not negligence. *The Tom Lisle*, 48 Fed. 690, 693. Even if there were negligence, which we assert did not exist, that fact would be immaterial in view of the provisions of clause 25 of the bill of lading which is quoted in the Supplemental Opinion of the District Court. (J.A. 350a). This clause reads in part:

“\* \* \* It is intended that all the terms of this contract \* \* \* shall be valid and enforceable and available to the carrier so far as and whenever applicable law will permit even when there has been negligence.  
\* \* \*”

The District Court failed to give effect to the above clause on the ground that it operated merely as a defence. (J.A. 351a) This, however, is not what the clause says, but rather that all the terms of this contract are to be valid, enforceable and available to the carrier even when there has been negligence.

Consequently, clause 25 is applicable to all of the contractual terms of the bill of lading.

V. The decree of the District Court in so far as it dismissed the plaintiff's causes of action should be reversed with directions to ascertain the amount of the damages.

Dated, May 29, 1968.

Respectfully submitted,

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*Attorneys for Appellant*



BRIEF FOR APPELLEE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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Nos. 21,833, 21,834,  
21,835, 21,836

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ORIENT MID-EAST LINES, INC.,

Appellant,

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
CHURCH WORLD SERVICE, INC., LUTHERAN  
WORLD RELIEF, INC., and UNITED  
STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

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United States Court of Appeals  
for the District of Columbia Circuit

FILED JUL 9 1968

*Nathan J. Paulson*  
CLERK

#### STATEMENT OF QUESTION PRESENTED

In the opinion of appellee, the question is whether the district court was correct in ruling that appellant Orient Mid-East Lines, Inc. did not use reasoned judgment in failing to heed the repeated warnings of the impending freeze of the St. Lawrence Seaway when it delayed the arrival of its ships at the Seaway until after freezeup; that it was thereby foreclosed from relying on its bill of lading clauses enabling it to retain freight while terminating a voyage because of ice closure, and that Orient Mid-East was entitled to one freight only, without extra compensation for fulfilling its duty to care for appellees' cargo overwinter, and without a "second" freight for resuming the voyage in the Spring.

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\* Cases chiefly relied on are marked by asterisks.



IN THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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Nos. 21,833, 21,834,  
21,835, 21,836

ORIENT MID-EAST LINES, INC.,

Appellant,

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
CHURCH WORLD SERVICE, INC., LUTHERAN  
WORLD RELIEF, INC., and UNITED  
STATES OF AMERICA,

Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLEE UNITED STATES

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COUNTERSTATEMENT OF THE CASE

This is an action for second freights<sup>1/</sup> and extra compensation under bills of lading constituting a contract of affreightment. Appellant Orient Mid-East Lines, Inc. (Orient Mid-East) seeks to be paid two freights for delivering appellees' cargo: one from the time of loading to the time its two ships were

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<sup>1/</sup> Freight is the compensation earned by a carrier for delivering cargo.

locked into the Great Lakes when the St. Lawrence Seaway (Seaway) was closed by ice at midnight, December 5, 1964; the other for carrying the cargo on to destination when the Seaway reopened in April 1965. It also seeks extra compensation for caring for the cargo over the intervening winter.

In November and December, 1964, Orient Mid-East's ORIENT MERCHANT and OLAU GORM loaded at various Great Lakes ports, for delivery overseas, relief cargoes which had been donated by appellee United States to appellee voluntary agencies (CARE, et al.) (JA 8a, 38a, 67a-86a). The ORIENT MERCHANT sailed from her last loading port at 6:40 p.m. on December 3, 1964, and arrived at the Lakeward entrance to the Seaway at 1:47 p.m. on December 7, 1964 (JA 48a). The OLAU GORM sailed from her last loading port at 11:55 p.m. on December 5, 1964, and arrived at the Seaway at 1:10 p.m. on December 7, 1964 (JA 48a). The Seaway closed its 1964 navigation season at midnight on December 5, 1964 (JA 49a). There being no other exit to the sea, the ships proceeded to winter berth at Toronto (JA 81a, 86a).

Thereupon, Eagle Ocean Transport, Inc., Orient Mid-East's general agent in the United States, sent telegrams to shippers declaring the voyage terminated, claiming that all freights were earned, offering to discuss a new freight for a new voyage to start in the Spring, and confirming that the cargoes would be retained aboard over the winter, as requested (JA 50a). Except for Lutheran World Relief, the voluntary agencies withheld payment of freights which they had agreed to prepay (JA

50a). Negotiations resulted in an agreement that Orient Mid-East would deliver in the Spring and the shippers would pay one freight, both sides reserving all rights, claims, and defenses they might have (JA 51a-52a). Thereafter, all freights were paid (JA 52a, 61a). Orient Mid-East cared for the cargo over the winter (JA 54a). The OLAU GORM sailed in April 1965, and delivered her cargo without relevant incident (JA 55a). The ORIENT MERCHANT sailed in April 1965, loaded more cargo at Lakes ports, but grounded on her way out and was declared a constructive total loss (JA 55a-58a). This latter incident is not here involved.

The cargoes were carried under bills of lading containing the following clauses:

5. In case of war, hostilities, . . . ice or closure by ice, or the happening of any other matter or event, whether of like nature to those above mentioned or otherwise, whether any of the foregoing are actual or threatened and whether taking place at or near the port of discharge or elsewhere in the course of the voyage and whether or not existing or anticipated before commencement of the voyage, which matters or events, or any of them, in the judgment of the Master or carrier may result in damage to or loss of the vessel . . . , or make it unsafe or imprudent for any reason to proceed on or continue the voyage or enter or discharge cargo at the port of discharge, or give rise to delay or difficulty in reaching, discharging at or leaving the port of discharge, the carrier or Master may . . . (2) whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, discharge the goods into depot, lazaretto, craft, or other place; or (3) proceed to return, directly or indirectly, to or stop at any port or place whatsoever, in or out of the regular route and short of or beyond the port of



discharge as the Master or the carrier may consider safe or advisable under the circumstances and discharge the goods, or any part thereof at any such port or place. When the goods are discharged from the ship, as herein provided, they shall be at the risk and expense of the shipper and/or receivers; such discharge shall constitute complete delivery and performance under this contract, full bill of lading freight and charges shall be deemed earned and the carrier shall be freed from any further responsibility. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation, for which, together with any unpaid freight and charges, the carrier shall have a lien on the goods.

13. The terms of this bill of lading constitute the contract of carriage . . .

25. It is intended that all the terms of this contract including all exemptions from liability shall be valid, enforceable and available to the carrier so far as and whenever the applicable law will permit even where there has been negligence or unseaworthiness for which the carrier is chargeable and that in all instances where it may be possible to contract against the consequences of negligence or unseaworthiness, the Carrier, although negligent, or the ship be unseaworthy, shall not be under any liability whatever.

31. Full freight hereunder to port to discharge or port of destination, if named, shall be considered completely earned on receipt of the goods by the Carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatsoever ships and/or cargo lost or not lost.

If there shall be a forced interruption or abandonment of the voyage at the port of shipment or elsewhere, any forwarding of the goods or any part thereof by vessels of the same line or otherwise shall be at the risk and expense of the goods. (JA 41a-43a, 350a.)

Orient Mid-East is an experienced operator of vessels in the Great Lakes, having operated there since the opening of the Seaway in 1959 (JA 58a). Orient Mid-East's general agent in the United States was Eagle Ocean Transport, Inc. (JA 50a, 114a). Eagle Ocean's general manager was Mr. Orestes Pendias (JA 144a). Mr. Pendias was the sole decision-maker as to when to sail Orient Mid-East's ships (JA 153a), since he helped to form Orient Mid-East (JA 144a) and Eagle Ocean operated only Orient Mid-East Lines (JA 162a).

In addition, the firm of Hurum Shipping and Trading Company, Ltd. (Hurum), was Orient Mid-East's Montreal agent (JA 46a, 47a, 169a). Hurum was known as Orient Mid-East's agent to St. Lawrence Seaway Authority (Seaway Authority) personnel trying to convey to shipowners the need for early clearance of the Seaway System (JA 253a-255a). Hurum was a member of the Shipping Federation of Canada (JA 169a), to which regular notices of Seaway conditions were sent by the Seaway Authority.

As the end of the 1964 navigation season approached, the Seaway Authority on November 2, 1964, issued Seaway Notice No. 10 of 1964, setting November 30 as the formal date for the closing of the South Shore Canal (JA 46a), and advising "masters and owners of ocean vessels . . . that it is their responsibility to schedule their passages to ensure clearing the South Shore Canal to St. Lambert before the closing date if they wish to avoid being forced to winter above Montreal, should an early freeze occur this year, as it has in a number of years past," although operations could continue beyond the formal closing,

weather permitting, "subject to close on very short notice"  
(JA 47a).

Later in November 1964, the Seaway Authority saw that the closing days were going to be especially severe, and arranged to have the trade made aware of its concern by telegrams and newspaper articles (JA 206a-207a). The telegrams were of two types. In one type, the Seaway Authority queried shipowners and agents for ships' arrival times at the Seaway (JA 214a-215a). As to Orient Mid-East specifically, the following telegrams were exchanged, all on November 25:

CORNWALL ONT 25 1129AM EST

HURUM SHIPPING BOARD OF TRADE BLDG  
300 ST SACREMENT ST MTL QUE  
IN THE BEST INTERESTS OF ALL CONCERNED WE  
RESPECTFULLY REQUEST ETA OF OCEAN VESSELS  
FOR SEAWAY TRANSIT RE APPROACHING CLOSING  
OF THE 1964 NAVIGATION SEASON 1 ETA UPBOUND  
ST LAMBERT LOCK ONE 2 ETA DOWNBOUND PORT  
COLBORNE LOCK EIGHT 3 ETA DOWNBOUND IROQUOIS  
LOCK SEVEN  
D MACKENZIE ST LAWRENCE SEAWAY AUTHORITY

ETA 1964 1 ETA 2 ETA 3 ETA  
NOV25/64/1145AKN  
TALASHIP MTL

NOVEMBER 25th PM  
STLAWRENCE SEAWAY AUTHORITIES  
ATT MR D MACKENZIE  
CORNWALL ONTARIO

REYOUR CABLE VESSELS TRANSIT STOP UPBOUND  
NIL STOP DOWNBOUND MS MALMANGER ETA IROQUOIS  
NOV 27/28TH AND MT PONTOS ETA IROQUOIS NOV  
28TH STOP REGARDING ORIENT MERCHANT AND OLAU  
GORM PRESENTLY IN LAKES CONTACT OUR PRINSIPALES  
ORIENT MID EAST LINES NEW YORK

HURUM SHIPPING AND TRADING  
BOARD OF TRADE BLDG  
MONTREAL PQ

EAGLOTRANS

WU CPL NY GA

TWX121

RAA151 CORNWALL ONT 25 1129A

ORIENT MID EAST LINE 29 BROADWAY  
NEW YORK NY

IN THE BEST INTERESTS OF ALL CONCERNED WE  
RESPECTFULLY REQUEST ETA OF OCEAN VESSELS  
FOR SEAWAY TRANSIT RE APPROACHING CLOSING  
OF THE 1964 NAVIGATION SEASON 1 ETA UPBOUND  
ST LAMBERT LOCK ONE 2 ETA DOWNBOUND PORT  
COLBORNE LOCK EIGHT 3 ETA DOWNBOUND IROQUIS  
LOCK SEVEN

D MACKENZIE ST LAWRENCE SEAWAY AUTHORITY  
COL 1964 1 ETA 2 ETA 3 ETA  
GVN 145 P

WU CBL NY GA  
EAGLOTRANS  
NOV.25 1730

D. MACKENZIE  
ST. LAWRENCE SEAWAY AUTHORITY  
CORNWALL ONTARIO

YOURS TODAY ETAS 1 NONE 2 OLAUGORM SEVENTH  
ORIENT MERCHANT SIXTH EXXX 3 OLAUGORM EIGHTH  
ORIENTMERCHANT SEVENTH RESPECTFULLY REQUEST  
IMMEDIATE ADVICES EVEN AUTHORITIES DECIDE  
CLOSE SEQXX SEAWAY SOONER IN ORDER ATTEMPT  
ALTER ARRANGEMENTS  
OREMEAST

PLS SEND LT PLS AND ACKN GAS

RECD OX 430P

TK

(JA 46a-48a, 87a, 88a.)

The second type of telegram, starting November 16, 1964  
(JA 210a), was directed by the Seaway Authority to the Shipping  
Federation of Canada, giving the water temperature at St.  
Lambert Lock -- the critical point in closing the Seaway (JA  
210a) -- for certain dates in 1964, compared with the same dates

in 1963 (JA 207a-210a, 217a-221a, 284a-290a). The dates and data from these telegrams relevant to Orient Mid-East's ships were as follows:

<u>Date</u>	<u>1964 Temp.</u>	<u>1963 Temp.</u>	
Nov. 23	36°F	44°F	(JA 284a)
25	34.5	43	(JA 285a)
26	35	41	(JA 286a)
27	34.5	41	(JA 287a)
30	34.5	40	(JA 288a)
Dec. 2	32	36.5	(JA 289a)
4	32	34	(JA 290a)

Mr. Pendias knew that such information was available, but made no attempt to obtain it (JA 155a, 163a-164a). This is the most reliable guide to the heat remaining in the water before freezing (JA 206a).

The above-listed telegram of November 26 added that the:

. . . Seaway Authority has issued an urgent warning to ocean vessels to make arrangements to clear the system by the official closing date, November 30, previously announced.

. . . A continuance of present weather trends could bring a forced closing on a very short notice. (JA 286a)

Shortly thereafter the Seaway Authority telephoned agents for ships showing delayed arrival times at the Seaway, reinforcing the telegrammed warnings (JA 214a-218a, 236a). Orient Mid-East was one of these telephoned (JA 216a), particularly because its telegram of November 25 disturbed the Seaway Authority by asking for something the Authority could not give (JA 233a-

236a). Captain Butt of the Authority telephoned Mr. Pendias on December 1, because Hurum, Orient Mid-East's Montreal Agent could not obtain any results (JA 253a-254a), explained the deterioration of the weather and strongly advised Mr. Pendias to sail his ships (JA 255a, 257a-258a). Mr. Pendias denied that such conversation took place at all (JA 146a, 159a, 190a). A telephone call from Mr. Pendias to the Authority was made on December 2 (JA 146a, 159a, 248a, 250a, 256a, 257a-258a), but there is a conflict as to the substance of the conversation. Mr. Pendias testified that he was assured that his telegraphed arrival dates were all right (JA 184a-185a). Mr. MacKenzie testified that he emphasized to Mr. Pendias the factual situation and that his opinion was that Mr. Pendias' ships should be no further away than Port Colborne and downbound, as he advised all other callers (JA 248a, 250a).

Mr. Pendias did not visit the scene to see for himself or consult other operators (JA 153a). Nor did he obtain any meteorological data (JA 155a) although every indication was that 1964 was going to be an especially severe year (JA 206a-207a), and he knew that such data was available (JA 155a). Similarly, he did not follow closing reports in the New York Journal of Commerce, an important commercial journal in New York City (JA 172a-173a). Mr. Pendias "relied on [the Seaway] a hundred per cent" (JA 154a), that is, he "relied entirely on that telegram" (JA 164a) of November 25, 1964, set forth at page 7 above.

On the foregoing evidence, the district court found that Orient Mid-East did not act reasonably (JA 347a), and dismissed its causes of action for second freights (JA 348a, 354a) and for compensation for overwinter storage (JA 354a). The court below also awarded Orient Mid-East judgment on its cause of action for collection expenses and interest on the freights paid after a period of withholding (JA 354a). This award is not involved on this appeal.

#### SUMMARY OF ARGUMENT

It is well settled that a carrier may take advantage of contract clauses of the type hereininvolved (entitling it to freight when delivery at the intended point is prevented by "ice or closure by ice" (clause 5), "vessel and/or cargo lost or not lost" (clause 31)) only in circumstances where it has exercised reasonable judgment concerning the cause of the frustration of the voyage. In this case, the district court correctly found that Orient Mid-East had failed to exercise reasonable judgment. As the record discloses, Orient Mid-East did not avail itself of the information at its disposal respecting existing ice conditions and, further, disregarded advice received from the Seaway Authority as to the severity of these conditions.



## ARGUMENT

### I

ORIENT MID-EAST MUST EXERCISE REASONABLE JUDGMENT UNDER CIRCUMSTANCES THEN EXISTING AND REASONABLY FORESEEABLE, BEFORE IT MAY TAKE ADVANTAGE OF ITS FREIGHT-EARNED CLAUSES

Although a carrier may write into its bill of lading clauses establishing the shipper's liability for freight regardless of actual delivery, Alcoa S.S. Co. v. United States, 338 U.S. 421 (1949), it may not have the freight when the voyage fails through its own fault. As was said in Merchants Corp. of America v. 9655 Long Tons, No. 2 Yellow Milo, 238 F. Supp. 572, 574 (S.D. Tex. 1965):

The prepaid freight clause involved here was developed to require the cargo owner to share with the vessel owner to some extent the inherent risks of ocean transportation attributable to uncontrollable events such as perils of sea, act of God, and restraint of princes. However, no case has been found which imposed upon a charterer the obligation to pay freight under such a clause where the failure of the voyage was attributable to the fault of the vessel owner. To the contrary, the converse is the rule. [Citations omitted.]

And see Mediterranean Agencies, Inc. v. Rethymnis & Kulukundis, Ltd., 185 F. Supp. 34, 35 (S.D.N.Y. 1960), holding that enforcement of a freight-earned clause can be had only when "the voyage was broken up by legal impossibility of performance, without fault on the part of shipowner and by causes beyond control of the carrier."

Thus, no court has automatically applied the freight-earned clauses. Whether granting or denying freights, extra compensation, or the right to discharge at other than the intended port,



the courts have carefully scrutinized the carrier's conduct. Throughout these cases the standard applied is the familiar one of reasonable conduct under the circumstances known or knowable at the time.

The cases enforcing clauses of this type (which are relied upon by Orient Mid-East in its brief, pp. 16, 18, 19, 29) all involved either war or strikes.<sup>2/</sup> It will be noted that, in each of these cases except De La Rama, the event either occurred, or grew to frustrating proportions, after sailing. In De La Rama, the ship never left port, but it was held nonetheless reasonable for it to continue loading for the Philippines after Pearl Harbor since no one expected the rapidity of the Japanese Pacific invasion. This aspect -- the time factor in making the judgment -- is best summed up in The Wildwood, supra, 133 F.2d at 767:

. . . The parties are agreed that Clause 4 [like clause 5 here] empowered the Carrier to abandon that voyage only if it was a reasonable inference from facts chargeable to the Carrier's knowledge when the voyage contract was made and the voyage later abandoned, that the hazard of such seizure had become substantially greater during the voyage than anticipated by the parties at its beginning.

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2/ The war cases are: De La Rama S.S. Co. v. Ellis, 149 F.2d 61 (9th Cir. 1945), cert. denied 326 U.S. 718 (1945); Colonial-g/f v. Moore-McCormack Lines, 83 F. Supp. 464 (S.D.N.Y. 1949), aff'd 178 F.2d 288 (2d Cir. 1949); and The Wildwood, 133 F.2d 765 (9th Cir. 1943), cert. denied 319 U.S. 771 (1943). The strike cases are: Hirsch Lumber Co. v. Weyerhaeuser S.S. Co., 233 F.2d 791 (2d Cir. 1956); Kroll v. Silver Line, 116 F. Supp. 443 (N.D. Cal. 1953); Int'l Packers v. Federal Maritime Comm., 123 U.S. App. D.C. 55, 356 F.2d 808 (1966); Associated Lead Mfrs. v. Ellerman & Bucknall S.S. Co., [1956] 2 Lloyd's List L.R. 167; and G. & H. Renton Co., Ltd. v. Palmyra Trading Corp., [1957] A.C. 149 (1956).

On the other hand, enforcement of such clauses has been uniformly denied where the shipowner was found to have known, actually or constructively, that the voyage would likely be frustrated. An apt example is Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero, 213 F. Supp. 97, 102 (S.D.N.Y. 1963), aff'd 324 F.2d 955 (2d Cir. 1963), in which the shipper was awarded the cost of carriage from the port of deviation to the port of destination, notwithstanding a clause 5 similar to the clause 5 involved here, on the ground that:

Nor can the [shipowner] justify its deviation on the ground of the congestion at the port of Vizag, especially since such congestion and delay were expectable at the onset of the venture. . . . [The shipowner] when it booked the libelant's cargo had a good idea of what risks it was likely to encounter in discharging the cargo at Vizag. It took a gamble for the \$87,755.99 in freight that conditions would improve, and it lost.

And see The Ruth Ann, 192 F. Supp. 607 (D.P.R. 1961), vacated for further proceedings 307 F.2d 415 (1st Cir. 1962), adhered to 228 F. Supp. 501 (D.P.R. 1964), aff'd 335 F.2d 678 (1st Cir. 1964) (carrier liable for deviation caused by Cuban embargo it should have foreseen); Morrissey v. S.S. A. & J. Faith, 252 F. Supp. 54 (N.D. Ohio 1965) and Merchants Corp. of America v. 9655 Long Tons, No. 2 Yellow Milo, 238 F. Supp. 572 (S.D. Tex. 1965) (vessel seized under judicial process which the owner ought to have foreseen); and The Louise, 58 F. Supp. 445 (D. Md. 1945) and Zonite Prods. Inc. v. Reed Nav. Co., 52 N.Y.S. 2d 603 (1944) (freight denied under freight-earned clauses to carriers whose ships were too unseaworthy to proceed).

The rule of these cases is clear: when by freight-earned clauses parties agree that the carrier's obligation to deliver shall not be absolute, but that the risks shall be shared, the carrier owes the shipper the duty of making a reasoned judgment as to those risks, on the basis of the facts available at the time the judgment whether or not to load and sail is made. This is the standard the district court applied.

## II

ORIENT MID-EAST FAILED TO EXERCISE REASONABLE JUDGMENT CONCERNING CLOSURE ON SHORT NOTICE OF THE SEAWAY UNDER CIRCUMSTANCES THEN EXISTING AND REASONABLY FORESEEABLE, AND THEREFORE MAY NOT RELY ON ITS FREIGHT-EARNED CLAUSES

As above noted, all of the cases relied upon by Orient Mid-East enforcing clauses of this type involved war and strikes, probably the most capricious and unforeseeable events a carrier can experience. But ice closure on the Great Lakes is a foreseeable event, and therefore an avoidable one. Grammer S.S. Co. v. James Richardson Sons, 37 F.2d 366 (W.D.N.Y. 1929), aff'd 47 F.2d 186 (2d Cir. 1931); The H. & N.Y. No. 11, 1936 A.M.C. 1711 (S.D.N.Y.; not otherwise reported), aff'd 89 F.2d 9 (2d Cir. 1937). And see Petition of Kinsman Transit Co., 338 F.2d 708, 714 (2d Cir. 1964), cert. denied 380 U.S. 944 (1964). Very close on point is Gans S.S. Line v. Wilhelmsen, 275 Fed. 254 (2d Cir. 1921), cert. denied 357 U.S. 655 (1921), wherein a closure of the Panama Canal by a rock slide was held to be no excuse for a charterer's failure to make timely redelivery of the ship to her owner. The Canal being widened at the time, the charterer should have foreseen closure and therefore could

not claim the Act of God defense.

In the present case, the record clearly shows that Mr. Pendas, who was responsible for Orient Mid-East's ship movements, could have obtained ample precise information warning him of the marginal weather conditions obtaining in the closing days of the 1964 navigation season, which conditions could force closure on short notice.

Seaway Notice No. 10 of 1964 set November 30 as the formal closing date (JA 46a), warning that ships should clear before that date to avoid being frozen in should an early freeze occur, and that Seaway operations beyond that date would be subject to close on very short notice (JA 47a). Thereafter, beginning on November 16 (JA 210a) the Seaway Authority sent telegrams to the Shipping Federation of Canada, giving the water temperatures at St. Lambert Lock for certain dates in 1964 as compared with the same dates in 1963. For November 23, 25, 26, 27 and 30 the telegrams showed that the 1964 temperatures were 5.5 to 8.5 degrees lower than the same days in 1963 (JA 284a-288a). The December 2 and 4 telegrams showed freezing temperatures, 4.5 and 2 degrees lower (JA 289a, 290a). These temperatures are the most reliable guide to the heat remaining in the water before freezing occurs (JA 206a).

The telegram of November 26 added to the concrete data "an urgent warning . . . to clear the system by the official closing date, November 30", because "a continuance of present weather trends could bring a forced closing on a very short notice" (JA 286a). Every indication was that 1964 was going to be an

especially severe year (JA 206a-208a).

Mr. Pendias knew that the foregoing information was available but made no attempt to obtain it (JA 155a, 163a-164a). He consulted no other operator or expert to help him make his decision (JA 153a), obtained no meteorological data although he knew that such was available (JA 155a), and did not follow closing reports in the New York Journal of Commerce, the commercial "bible" (JA 184a) in Mr. Pendias' own city (JA 172a-173a). He neither visited the Lakes himself (JA 153a) nor consulted with Orient Mid-East's Montreal agent Hurum (JA 46a, 57a, 169a), but rather seemed to be disregarding Hurum (JA 47a, 232a, 234a, 254a).

Instead, Mr. Pendias "relied on [the Seaway] a hundred per cent" (JA 154a). There was no warrant for this. The Seaway Authority is not by statute, treaty, or regulation constituted an advisor to carriers (JA 241a-243a). Seaway Notice No. 10 advised "masters and owners . . . that it is their responsibility . . . to ensure clearing . . . St. Lambert before the closing date" (JA 44a, emphasis added). The Seaway Authority never held itself out to Mr. Pendias as an expert (JA 158a-159a). The Authority had a delicate enough decision of its own to make (JA 208a-209a, 226a), without undertaking to add carriers' troubles to its own. Mr. Pendias merely proceeded on a general understanding held not by him but by unidentified Lakes operators that the Seaway Authority could decide for him (159a). In fact, Mr. Pendias never familiarized himself with the Seaway Authority's operations (JA 174a).

Mr. Pendias "relied entirely on [his] telegram" (JA 164a) of November 25 to the Seaway Authority. That telegram is on its face obscure (JA 48a). It does not explain its real purpose, which was that Mr. Pendias needed to know the Seaway's decision four days in advance of closure for one ship and a day and a half for the other. Nor did he ever explain this need to the Seaway Authority by telephone (JA 158a-159a, 165a). He assumed that the Authority would know all the ramifications of his problem (JA 157a-158a), although to comply with his telegram's request the Authority would have to know first, how much advance notice he needed, and second, that far in advance the exact date when the Seaway would have to close. But the Seaway Authority keeps only a list of vessels and arrival times, not of vessel positions (JA 215a), and could not forecast in advance of short notice the actual moment of closure (JA 233a-236a).

The warnings in Notice No. 10 and the November 26 telegram that the Seaway would have to close on very short notice were proved correct by the radio broadcast notice first sent out at 2:00 p.m., December 5, 1964, and at four-hour intervals thereafter, that the Seaway was closed as of midnight, December 5 (JA 49a, 213a-214a, 228a-230a). Neither of Orient Mid-East's ships arrived at the Seaway entrance until between 1:00 and 2:00 p.m. on December 7 (JA 48a). Neither ship was close enough to have arrived before the midnight closing, had it heard such broadcast (JA 49a).

All the foregoing failures on the part of Orient Mid-East and Mr. Pendias are incontestable facts of record. There was a



conflict in the testimony on whether or not Mr. Pendias was telephoned on December 1 by Captain Butt of the Seaway Authority. The court below resolved the conflict against Mr. Pendias. Orient Mid-East reargues this credibility point vehemently (Br., pp. 6-9, 15, 21-25), to the extreme of characterizing the district court's discussion as "completely misleading" (Br., p. 8) and as stating material "half truth" (Br., p. 9). In fact, the court below noted that a call had been made on December 1 from the Seaway to Orient Mid-East. The court below was of course well aware that the switchboard attributed this call as from Mr. MacKenzie of the Seaway Authority to Mr. Lyras. But Mr. MacKenzie made no such call on December 1 (JA 248a), and a Mr. Lyras, who was in court (JA 237a-238a) was not called by Orient Mid-East to refute anything Messrs. Butt or MacKenzie said. No Seaway Authority witness had any motive for falsehood. Mr. Pendias did -- the nearly million dollar value Orient Mid-East put on this lawsuit.

Nor was this the only disbelief of Mr. Pendias the court below expressed. Respecting a second call of December 2, Mr. MacKenzie said that he told Mr. Pendias that if the ships were his, he would, as of then, have wanted them no further away than Port Colborne and downbound; and further stated that he had given the same advice to other callers (JA 248a, 250a). Mr. Pendias testified, however, that he was assured that his December 7 and 8 dates were safe (JA 184a-185a). The court below resolved this conflict by pointing out that Mr. Pendias' "testimony is contrary to all other evidence showing concern

by the Seaway authorities of an early freeze-up" (JA 341a).

Had Messrs. Butt and MacKenzie never spoken to Mr. Pendias, Orient Mid-East would still have been at fault for having failed to obtain all the notices "showing concern by the Seaway authorities of an early freeze-up." These notices are just as basic to Seaway navigation as charts, light lists, and notices to mariners are to navigation generally. In The Maria, 91 F.2d 819, 824 (4th Cir. 1937), a suit under the Harter Act for damage to cargo jettisoned to relieve a stranding, it was said:

Our view of the law, now that the point has been definitely raised, is that charts, light lists, and similar navigational data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them.

Similarly, disregard of hurricane warnings precludes reliance on the Act of God defense to cargo claims under a bill of lading, Texas & Gulf S.S. Co. v. Parker, 263 Fed. 864 (5th Cir. 1920), cert. denied 253 U.S. 488 (1920) and to barge damage claims under a charter, Moran Transp. Co. v. New York Trap Rock Corp., 194 F. Supp. 599 (S.D.N.Y. 1966).

The foregoing are special cases of the general rule of maritime law that a vessel without current charts, light lists, and notices is unseaworthy. Davidson S.S. Co. v. United States, 205 U.S. 187, 194 (1907); Utility Service Corp. v. Hillman Transp. Co., 244 F.2d 121, 124 (3d Cir. 1957); Placid Oil Co. v. S. S. Willowpool, 214 F. Supp. 449, 453-454 (E.D. Tex. 1963); Continental Oil Co. v. M. S. Glenville, 210 F. Supp. 865 (S.D. Tex. 1962).



Mr. Pendias never obtained any warning of the Seaway Authority's urgent concern to have all oceangoing ships clear of the system by November 30 in view of the weather then anticipated, or of any ice information, and disregarded direct telephone advice to get clear. This is, as the court below noted, "hardly to be equated with mere negligence" (JA 350a).

In sum, the district court could only have concluded that Orient Mid-East failed in every respect to discharge its duty reasonably to judge the situation in light of the circumstances then existing. Certainly, the court below was not indulging in "improper flag discrimination" (Appellant's Br., p. 14) in refusing to rubber stamp Orient Mid-East's conduct as prudent (contrary to all the evidence) because the Maritime Subsidy Board ruled that the FLYING INDEPENDENT was trapped in the Lakes because of "conditions beyond the control of the operator" (Br., p. 25). The court below properly "brushed aside this decision of the Maritime Administration" (Br., p. 18). It would have been as improper for the court to abdicate its decision-making function to the Board, as it was for Orient Mid-East to abdicate its decision to the Seaway Authority. There can be no parallel between administrative factors appropriate to dispensing subsidy grace to a vessel "essential to the maintenance of adequate . . . Great Lakes/Europe Service" (JA 96a) which "will be again required in early April to meet the sailing requirements of this service" (JA 95a), and the judicial decision whether or not Orient Mid-East exercised sufficient reasoned judgment in deciding when to stop loading to allow it to keep freight it never really earned.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JUNE 1968

REPLY BRIEF FOR APPELLANT

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 21,833, 21,834, 21,835, 21,836

(Consolidated)

---

ORIENT MID-EAST LINES, INC.,  
*Appellant,*

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
UNITED STATES OF AMERICA, ET AL.,  
*Appellees.*

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On Consolidated Appeal From the United States District  
Court for the District of Columbia

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**United States Court of Appeals**  
for the District of Columbia Circuit

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**FILED** AUG 2 1968

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 21,833, 21,834, 21,835, 21,836

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ORIENT MID-EAST LINES, INC.,  
*Appellant,*

v.

COOPERATIVE FOR AMERICAN RELIEF EVERYWHERE, INC.,  
SEVENTH DAY ADVENTIST WELFARE SERVICE, INC.,  
CHURCH WORLD SERVICE, INC., LUTHERAN WORLD RE-  
LIEF, INC., and UNITED STATES OF AMERICA,  
*Appellees.*

---

On Consolidated Appeal From the United States District  
Court for the District of Columbia

---

REPLY BRIEF FOR APPELLANT ORIENT MID-EAST  
LINES, INC.

---

**SUMMARY OF QUESTION PRESENTED**

The bills of lading in this case contained an "ice clause" under which the shipowner was entitled to terminate the voyage if there was a closure by ice "whether or not existing or anticipated before commencement of the voyage" which made it unsafe or imprudent to proceed on or continue the voyage, etc. (See bill of lading clauses quoted in appellees' brief pages 3 and 4 and J.A. 41a, 42a and 43a).

The above clauses were part of the contract of carriage entered into and their presence in the contract was part of the consideration which entered into the fixing of the freight rate.

The validity of the ice clause except under unusual circumstances is admitted by appellees.

At midnight December 5, 1964, vessels, with one exception, were not permitted to enter Iroquois Lock although vessels already in the Seaway were allowed to exit.

Negotiations between appellant and appellees resulted in an agreement that appellant would retain the cargoes on board its two ships, the ORIENT MERCHANT and the OLAU GORM, until the Seaway was opened, which would not take place until about the middle of April.

Appellants' position is that because the voyage had been terminated and freight earned it was entitled to additional freight for carrying the cargoes on board to destination; also to some remuneration for storing the cargoes on board its vessels from December 1964 to April of 1965. The amount of appellant's claim was not judicially determined. A long list of cases supporting appellant's position was cited in appellant's brief (pages 18, 19, 29), and these cases are again cited in appellees' brief in footnote No. 2, page 12.

In most of the cases cited, the cargo was left at the port of discharge and cargo owners had to pay additional freight to another carrier if they wished their cargo delivered at destination. However, in *Colonial-g/f v. Moore-McCormack Lines*, 83 F. Supp. 464 (S.D.N.Y. 1949), aff'd 178 F. 2d 288 (2d Cir. 1949), the cargo, after being carried to the Norwegian port of Trondheim, was brought back on the same ship to New York, the port of loading, the reason being that Trondheim had been occupied by the German army. In that case, the shipowner was allowed a freight for carrying the cargo back from Trondheim to New York although the owners of the cargo did not want

the cargo in New York. If the decision below is reversed, presumably the amount of appellant's claim will be fixed in the District Court, and it is hoped that that amount can be reached by negotiation between the parties.

None of the appellees notified the appellant to stop the loading of the ORIENT MERCHANT on December 1, nor did they notify the appellant that the OLAU GORM must arrive at Iroquois before midnight on December 5.

The appellees as well as the appellant were aware of the risk of closure by ice. They were willing to assume that risk in order that their cargo would go forward by appellant's vessels, thereby avoiding the increased expense of land transit to the seaboard.

### ARGUMENT

#### I. Half truths and misconceptions in the brief of appellees

At page 6, appellees' brief states that in late November, 1964, the Seaway Authority, believing that the closing dates "were going to be especially severe," arranged to notify those interested "of its concern."

Of special importance is the telegram which the Seaway sent to the appellant on November 25 reading, as follows:- (J.A. 87a, Appellant's brief p. 5)

"IN THE BEST INTERESTS OF ALL CONCERNED WE RESPECTFULLY REQUEST ETA OF OCEAN VESSELS FOR SEAWAY TRANSIT RE APPROACHING CLOSING OF THE 1964 NAVIGATION SEASON 1 ETA UPBOUND ST LAMBERT LOCK ONE 2 ETA DOWNBOUND PORT COLBORNE LOCK EIGHT 3 ETA DOWNBOUND IROQUOIS LOCK SEVEN"

This telegram did not contain *one word* of warning that the closing dates "were going to be especially severe." On receipt of this telegram appellant immediately replied,

stating that the OLAU GORM would be at Port Colborne Lock (on the Lake Erie side of the Welland Canal) on December 8 and that the ORIENT MERCHANT would be in the same position on December 6.

The same telegram also informed the Seaway that the OLAU GORM would be at Iroquois Lock, the entrance to the Seaway, on December 8 and that the ORIENT MERCHANT would be in that position on December 7. This reply of the appellant ended with the following significant words:

**"RESPECTFULLY REQUEST IMMEDIATE ADVICES EVENT AUTHORITIES DECIDE CLOSE SEAWAY SOONER IN ORDER ATTEMPT ALTER ARRANGEMENTS"**

(This telegram as quoted in appellees' brief at page 7 is not completely correct since, as shown by the Stipulation of Facts (J.A. 48a), the word "even" should be "event"). The so-called second type of telegram was sent by the Seaway to a Canadian shipping organization. This type of telegram, except the telegram dated November 26, gave no warning of early closing of the Seaway, but it did compare the water temperature in St. Lambert's Lock with the 1963 temperature, showing that the 1964 temperature was somewhat lower than the 1963 temperature. However, these figures alone were not necessarily alarming because, in 1963, the Seaway had admittedly remained open until December 13. (J.A. 60a, appellant's brief page 14).

Obviously, the telegrams dated December 2 and 4 were worthless as regards the ORIENT MERCHANT as even if they had been sent direct to appellant and had been acted upon, the ORIENT MERCHANT could not have reached Iroquois by December 5, and the same applies to the OLAU GORM, as regards the telegram of December 4.

The appellees' brief states at page 8 that the Seaway telephoned the appellant because its telegram of Novem-



ber 25 disturbed the Seaway Authority by asking for something the Authority could not give.

If, in fact, the Seaway anticipated an early closing as of November 25, it should have telegraphed appellant that its dates were unreliable; but it did not do so.

Appellees' brief further states that, shortly after November 26, the Seaway Authority telephoned agents for some ships which showed delayed arrival times at the Seaway. While it is true that Captain Butt testified that he telephoned the appellant in New York on December 1, this testimony is obviously incorrect as pointed out in appellant's brief, pages 21-25. Moreover, Captain Butt admitted that he neglected to telephone the agents of the FLYING INDEPENDENT, and his testimony that he telephoned the agents of the VAN FU was vague. (J.A. 258a)

Because of the importance of Captain Butt's testimony that he had a lengthy telephone conversation with Mr. Pendas on December 1, in which, according to Captain Butt, Mr. Pendas was "strongly advised to get his ships on the move to get out of the Seaway" (J.A. 255a, 258a), a summary of the evidence to show that no such conversation took place is included.

Mr. Pendas denied that he had any conversation with Captain Butt on December 1. (J.A. 151a, 157a, 159a, 190a, appellant's brief page 7)

The effect of Mr. Pendas' denial is to be set off one man's word against the other's; additional evidence in the case is overwhelming to show that Captain Butt's alleged conversation never took place.

On the very next day (December 2) Mr. Pendas phoned the Seaway to ask if his two ships could safely be a day or two late, beyond the dates stated in appellant's telegram of November 25. (J.A. 145a, 164a, 248a) Why should Mr. Pendas have phoned the Seaway to know if

his ships could stay later than the dates fixed in the telegram of November 25 if he had been told by Captain Butt on the date preceding that he should get his ships on the move immediately? Other parts of Captain Butt's testimony demonstrate his unreliability as a witness.

He was asked if there was any written evidence to show that he made such a call on December 1. He said that he knew of none. (J.A. 258a) A well-run organization would keep a record of all important calls, including the substance of what was said. This the Seaway did not do, but there would be other records which would throw some light on the subject, namely a record of the switchboard operator and a bill from the telephone company.

At a later stage of the case, Mr. Burnside testified that there was a written record that Mr. MacKenzie had telephoned Mr. Lyras (an executive of Eagle Ocean Transport) on December 1. (J.A. 260a) It is incredible that Captain Butt, one of the Seaway's executives, who had come to Washington to testify with Mr. Burnside and Mr. MacKenzie, did not know of these records. Evidently he did not wish to say anything about them because they contradicted his testimony that he had telephoned Mr. Pendias on December 1. Mr. MacKenzie denied that he made any telephone call on December 1. (J.A. 248a)

Reference is made to the fact that Mr. Nicholas A. Lyras, an executive of Eagle Ocean Transport, was present at the trial and was not asked to testify by either party.

There are several reasons for this.

1. Eagle Ocean Transport has two executives named "Lyras", (J.A. 237a) so that testimony by one of them would not conclusively show that the telephone conversation had not taken place with the other.

2. The burden rested upon the appellees to show that this call had taken place, and it was, therefore, their obligation to show that Captain Butt's conversation took

place with Mr. Lyras despite the Captain's testimony that he talked to Mr. Pendias. (J.A. 255a)

Of course, if Captain Butt had given the warning to which he testified to either of the two Lyrases, it would immediately have been passed on to Mr. Pendias. There is no evidence of this.

Appellees also argue that Mr. Pendias was in error in relying upon information or warnings to be received from the Seaway. Obviously, the Seaway Authority was the final arbiter on the time of closing. The Seaway would be kept open as long as conditions permitted, the closure to take place at the discretion of the Seaway when the Seaway reached the conclusion that closure was necessary.

Newspaper articles and inquiries made of other ship-owners would be misleading. In fact, in 1964 (J.A. 49a), 63 vessels cleared the Seaway downbound after December 1.

Despite the fact that Iroquois Lock was supposedly closed at midnight on the 5th, one vessel was allowed to pass Iroquois on December 6 at 0048 hours (J.A. 48a) and another passed Iroquois Lock bound for Lake Ontario on December 6, 1964, at 2015 hours (J.A. 49a); 13 vessels passed St. Lambert Lock bound for Montreal on December 6 and 7, and work boats were navigating the Seaway and passing through the Locks until December 10, 1964. (J.A. 49a) Appellees' brief implies that the Seaway inserted a warning in the New York Journal of Commerce, but this was not the case. (J.A. 174a)

While Mr. Pendias' principal reliance was on information to be received from the Seaway, this was not entirely the case, because the American ship FLYING INDEPENDENT was loading at Kenosha, Wisconsin, a few miles south of Milwaukee, and Mr. Pendias received reports from his port captain that the FLYING INDEPENDENT would not sail until Dec. 4. (J.A. 156a)

Mr. Pendias did telephone the Seaway on December 2nd, and it is incredible that if Mr. MacKenzie had given Mr. Pendias the warning that he said he did, the ORIENT MERCHANT and the OLAU GORM would not immediately have started for Iroquois. It is true that on the 2nd the ORIENT MERCHANT could not have arrived in time to pass through, but on December 2 that was not known because Mr. Burnside did not decide on closure until December 5 about 1 p.m. (J.A. 213a)

In reaching a decision as to the date of sailing for Iroquois, Mr. Pendias had to balance two considerations.

If the ORIENT MERCHANT had sailed on December 1, she would have shut out 4343 tons of cargo, and the insurance taken out by the appellant to cover the cost of forwarding cargo to the seaboard would have been insufficient, with the result that 781 tons would have had to bear the expense of forwarding. (appellant's brief, p. 12) The fact that this insurance had been taken out (appellant's brief, pages 12, 13) has a very important bearing on the decision in this case; nevertheless, this insurance is not mentioned by the learned trial judge nor in appellees' brief, because it falsifies their contentions.

The taking out of this insurance shows that Mr. Pendias was not reckless and careless as contended by appellees. Mr. Pendias knew that his ships might have to sail leaving considerable quantities of cargo behind, and it was to cover this risk that Mr. Pendias placed insurance "to indemnify the Assured \* \* \* for the actual costs and expenses voluntarily incurred by the Assured for re-forwarding such cargoes which they are unable to load at Great Lakes Ports by reason of the vessel being delayed and thereby being forced to discontinue loading operations \* \* \* by reason of the announced closing date of the St. Lawrence Seaway \* \* \*" (J.A. 274a, 279a) This insurance benefited shipowners and shippers alike. A person who is so foresighted as to effect insurance of the

above character by November 16th (J.A. 274a, 279a) cannot be considered reckless and careless.

If the ORIENT MERCHANT had sailed for Iroquois on December 1, appellant might have sustained some small loss. As a consequence of being locked in the Lakes from December 1 to April, appellant sustained a loss of about \$300,000. Appellees' brief states that there was no motive on the part of the Seaway's witnesses to testify falsely, whereas such a motive did exist on the part of Mr. Pendias, admittedly an "experienced operator of vessels in the Great Lakes, having operated there since the opening of the Seaway in 1959." (Appellees' brief, page 5) There is no evidence that Mr. Pendias had any financial interest in appellant's profits or losses. On the other hand, the Seaway had its reputation to sustain and, as testified by Mr. Burnside (J.A. 226a), "goods held over the winter [in a ship] would not contribute, I think, to the general esteem in which the Seaway as a trade system was held \* \* \*." The endeavor of the Seaway witnesses was to prove when the ORIENT MERCHANT and OLAU GORM were shut out of Iroquois, this was in nowise due to the Seaway's fault or failure but rather to the crass negligence of the ships' operators.

It may be that Captain Butt was not a conscious prevaricator. He was testifying in April, 1967, to an incidental telephone conversation which allegedly had taken place on December 1, 1964, almost 2½ years previously, and his testimony is, as already pointed out, contradicted by written records. In the confusion with which the Seaway was apparently suffering in December, 1964, he may have believed that he gave a warning to Mr. Pendias on December 1, when that was not the case.

As regards the finding of the Maritime Subsidy Board that the FLYING INDEPENDENT was caught in the Lakes without blame attaching to her operators, appellees say that no question of "flag discrimination" was involved because for the Court to follow that decision would

be "to abdicate its function." There is no mention in the opinion of the lower court of the fact that the Maritime Subsidy Board attached no blame to the operators of the FLYING INDEPENDENT. The facts of the two cases are altogether similar. Indeed, the case of the FLYING INDEPENDENT is weaker than that of the ORIENT MERCHANT because the FLYING INDEPENDENT left its loading port 12 hours after the ORIENT MERCHANT and arrived in the vicinity of Iroquois later than the ORIENT MERCHANT. (J.A. 97a) We have, therefore, the contradictory situation where in the case of the FLYING INDEPENDENT no blame is attached, whereas in the case at bar the United States asserts that the operators of the ORIENT MERCHANT and OLAU GORM did not exercise reasonable judgment and therefore may not rely on the clauses in their bills of lading. This unjust result should not stand.

## II. Cases relied upon by Appellees

Appellees cite 27 cases but, of these 27, only two are marked with asterisks, indicating that they are the cases "chiefly relied on."

For the purposes of this reply brief, it seems necessary to mention only the cases marked with asterisks and a few more cases not so marked which are quoted from or otherwise noticed by appellees.

*Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero*, 213 F. Supp. 97 (S.D.N.Y. 1963), aff'd 324 F. 2d 955 (2d Cir. 1963), is cited by appellees at page 13.

This decision is discussed in appellant's brief, pages 31, 32. The facts are entirely different from the case at bar. The shipowner accepted cargo from a port which it knew was congested, and was held not entitled to deliver cargo at another port to avoid a delay which was known by the shipowner to exist at the commencement of the voyage.

The second case marked with an asterisk, *The Wildwood*, 133 F. 2d 765 (C.A. 9) cited by appellees at page 12, is an authority helpful to appellant. In that case, a shipper had loaded on board the WILDWOOD on February 20, 1940, a cargo consisting of copper bullion to be delivered at Vladivostok.

At the time when the voyage commenced, both parties had in contemplation that the voyage "was not as free of likelihood of seizure by a belligerent as in peace time." (133 F. 2d at p. 767) After the voyage had almost been completed, information was received that a British naval vessel had seized a steamer carrying copper to a like destination. The owners of the WILDWOOD immediately ordered her to proceed to a U.S. port in the North Pacific where the cargo was discharged and the voyage terminated.

Still more like the case at bar is *De La Rama S.S. Co. v. Ellis*, 149 F. 2d 61, in which case the steamer DONA ANICETA began loading cargo in New York for Philippine ports on December 5, 1941, and continued loading until 8 p.m. on December 8.

At 3 p.m. on December 7, the shipowner was notified of the attack on Pearl Harbor, air attacks on the Philippines, and the declaration of war by Japan; nevertheless the loading was continued.

On December 31st the DONA ANICETA was requisitioned by the U.S. Government and ordered to discharge her cargo.

The appellee in that case claimed that its goods should never have been loaded because of the knowledge brought home to the shipowner of the Japanese war declaration and the attack on the Philippines.

In holding that there had been no lack of the exercise of a reasoned judgment by the carrier, the Court said, page 64:



" \* \* \* The Court is obliged to put itself in the position of the actors, 'and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate.' The Styria 186 U.S. 1, 9."

\* \* \* \*

"No shipper had requested that the loading of his goods be suspended. Appellee himself made no attempt to halt his merchandise."

The similarity to the case at bar is obvious.

At page 11, appellees quote part of the opinion of the District Court in *Merchants Corp. of America v. 9655 Long Tons, No. 2 Yellow Milo*, 238 F. Supp. 572, 574. This case also is discussed in appellant's brief, page 33. There, the ship was disabled from performing the voyages from the moment the loading began. The facts in the case at bar are entirely different. When the ORIENT MERCHANT sailed from Milwaukee on December 3, 1964, there was no knowledge on the part of anyone that she might not safely pass through the Seaway. The OLAU GORM might have been allowed to pass Iroquois since St. Lambert Lock was not closed until December 7, 1964. (J.A. 49a, para. 21)

As pointed out in appellant's original brief that appellant was properly entitled to the first freights is now *res judicata* because the appellees admit liability for failure to pay these freights promptly (J.A. 354a) and the judgment in favor of appellant due to that failure in the amount of \$13,543.90, with interest, was not appealed from, and has now been paid. Referring to this subject, appellees euphemistically state (page 10): "This award is not involved in this appeal." In fact the award referred to could not now be involved in *any* appeal.

Appellees also cite *Gans S.S. Line v. Wilhelmsen*, 275 Fed. 254, C.A. 2. That case did not involve any question of prepaid freight nor in fact any question germane to the case at bar.



The facts were that by a charter provision Barber S.S. Co., a subtimecharterer of the THEMIS, was under a duty to redeliver the ship in early January, 1915. In September, 1914, Barber berthed the THEMIS to carry cargo from New York to Australian ports, the voyage to be made via the Panama Canal, which had recently been opened. Soon after sailing from New York, the Panama Canal had to be closed because of earth slides, and Barber & Co. accordingly directed the ship to proceed to Australia via South Africa, and disregarded its obligation to redeliver in January, 1915. The closure of the Canal did not in fact prevent Barber from redelivering as required by its contract, since the cargo could have been transshipped across the Isthmus and on-carried by another ship. For obvious reasons, the Court held that Barber did not make out an excuse under the "Act of God" exception in its charter party.

At page 19, appellees cite the case of *The Maria*, 91 F. 2d 819, 824, C.A. 4, where a ship was held liable for damage to cargo jettisoned to relieve a stranding. No freight question was involved.

The Court held in that part of the opinion quoted that:

" \* \* \* charts, light lists, and similar navigational data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them."

No question has been raised in this case as to the absence of proper charts, light lists, etc., and the decision is without relevance.

**CONCLUSION**

The decision of the District Court should be reversed insofar as it dismissed appellant's causes of action with directions to ascertain the amount of damages.

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